No. 105.

Brf. of Whitney for Pl'ff in Err.

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IN THE

Supreme Court of the United States.

Filed Nov. 29, 1902.

OCTOBER TERM, 1902.

CHARLES F. GALE, as Receiver of the Elmira National Bank,
Plaintiff in Error,
against
THE CHASE NATIONAL BANK,
Defendant in Error.

No. 105.

BRIEF FOR PLAINTIFF IN ERROR.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

CHARLES F. GALE, as Receiver of the Elmira National Bank, Plaintiff in Error, *against* THE CHASE NATIONAL BANK.	No. 105.

IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

This was an action to recover $15,012.50 with interest from May 5, 1893, being the amount of a certain check claimed to have been unlawfully charged by the defendant against the Elmira National Bank on said day; the deposit account of the Elmira Bank with the defendant having been soon thereafter settled, with the exception of this disputed item.

The action was first tried before Judge TOWNSEND and a jury, and a verdict rendered for the defendant. Upon writ of error the judgment entered upon this verdict was reversed by the Circuit Court of Appeals and a new trial ordered (104 Fed. Rep, 214, SHIPMAN, J.).

The action was tried for the second time before Judge SHIPMAN and a jury. A verdict was directed for the plaintiff for the sum of $12.50, with interest from said date. As to the balance of the claim the jury found for the defendant.

Upon a second writ of error by the plaintiff the judgment was affirmed (Record, p. 137, WALLACE and LACOMBE, JJ.).

Statement of the Case.

The Elmira National Bank suspended business on May 23, 1893. Charles Davis, its first Receiver, took possession on June 2 of that year. Charles F. Gale, the present Receiver, was his clerk and succeeded him after his death. J. J. Bush was at the time of its failure, and had been for over three years theretofore, the cashier of the bank. On May 5 of that year defendant, a national bank in New York City, held Bush's individual promissory note for $15,000, upon which there was due $12.50 interest. It held also certain shares of the stock of the Elmira Bank as collateral to said note. The Elmira Bank kept an account with defendant.

These facts are undisputed; and for the purposes of this statement of facts I shall assume the testimony of defendant's witnesses to be both competent and true.

On the afternoon of May 4, 1893, William H. Porter, Vice-President of the defendant the Chase National Bank, rang up Mr. Bush on the long-distance telephone, referred to the financial conditions then prevailing (commonly known as the panic of 1893), and asked him to substitute other collateral for his note or send

additional collateral. Bush replied that he would pay off the loan the next morning (pp. 22, 27). The next morning, when Porter came down to the bank, he found Bush sitting there. Porter says (pp. 22–23):

> He had a little satchel there with him on the table. He greeted me and referred to the telephone conversation of the previous day, and stated that he had come down to pay off the loan. He opened the satchel and took out of it a package of currency, $8,000, and a cashier's check or draft of the Elmira National Bank, signed by him as cashier on the Quaker City National Bank. It was for the purpose of paying off his note.

This Quaker City Bank was in Philadelphia. The draft was for the sum of $7,000, and, while signed by him as cashier of his bank, was made payable to himself individually (p. 26).

It was not claimed in the answer or on the trial that either the currency or the draft belonged to Bush or to any other owner than the Elmira Bank. The currency was taken by Bush out of the till and "was the bank's money" (pp. 79–81). The Court charged the jury that both the currency and the draft were embezzled (p. 105).

Porter declined to accept the tender, because the reputation of Philadelphia banks was such at that period that he was unwilling to treat a draft on Philadelphia as cash. His explanation of the situation is as follows (pp. 23, 28):

> As a bank officer, Mr. Bush appreciated, as I did, the situation in Philadelphia, which was more acute on account of the panic than anywhere else in the United States, not excepting New York, and it was impossible to get money or returns for checks on Philadelphia. * * * My reasons for

refusing the Philadelphia draft were not that the credit of the Philadelphia bank was not good. That was not the point. Our Philadelphia correspondents were several weeks in arrears at that time, and had not paid us the money on checks we had sent there to collect for several weeks. They had put them to our credit, but had not remitted for them, because it was impossible to buy New York funds in Philadelphia. You could not go into a Philadelphia bank and buy a draft on New York for any money. They were four weeks delinquent in remitting. I did not have the Quaker City Bank particularly in mind. I had no objection to the bank at all. I objected to any check on any Philadelphia bank. It would have been the same on any other bank.

Bush then said that he was anxious to use this $7,000 draft, and asked how it could be done. Porter replied in effect with a suggestion that, while he himself would not permit his own bank to give credit to Philadelphia, Bush might, if he pleased, assume that risk for the Elmira Bank; and Bush accepted the suggestion. Porter states it as follows (pp. 23, 28):

I told him that I did not know of any way unless, if he kept a personal account with the Elmira National Bank, which he said he did, he drew his personal check on the Elmira Bank for the amount of this loan, $15,000, and the interest which was due for four or five days, and accept that check as cashier of the bank, making it payable at the Chase National Bank at New York, which was New York funds, and would be available to pay a note payable in New York City, and to let that $15,000 be deposited to the credit of his bank, the Elmira Bank, the $8,000 of currency and the $7,000 check. He said that was acceptable to him.

> * * * I was unwilling on May 5, 1893, to take a Philadelphia bank draft and credit it on my books, and allow him to draw against it if it was a large draft. In this case he was going to pay off a loan and the interest on it. I suggested this arrangement as the only way I knew whereby he could use this Philadelphia check.

Although connected by telephone with the Elmira Bank, Porter made no inquiry there as to Bush's authority in the transaction, nor did he make any inquiry of Bush himself as to his ownership of the currency or right to use the $7,000 draft. Porter says (p. 29):

> I never communicated at any time with any of the other directors or officers of the Elmira Bank about Mr. Bush's authority in this transaction, either at the time or afterwards. I made no inquiry of Mr. Bush as to whether he owned the currency or whether it belonged to the Elmira Bank. I made no inquiry of him as to his authority to use this draft for his personal benefit.

Bush then endorsed the $7,000 draft "For deposit in Chase National Bank to credit of J. J. Bush, cashier." "Having done that, he noticed that it was drawn to his personal order and endorsed as cashier, and, instead of endorsing it personally above this cashier endorsement, he wrote the word 'cashier' on the face of the draft to make it correspond with the endorsement which he had already made" (p. 26).

Porter wrote out a check of the Elmira Bank for $15,012.50, payable to the order of the Chase Bank, and wrote across the back the words "Certified and accepted, May 5, 1893, payable at Chase National Bank, New York. Elmira National Bank by.....

Bush then signed on the face "J. J. Bush" and on the back "J. J. Bush, Cashier" (Complaint, p. 7, not controverted; Testimony, p. 23).

Porter then called in the discount clerk and gave him the $8,000 currency, the $7,000 draft and the $15,012.50 check, instructing him to have the latter charged up to the Elmira Bank's account, and the other items credited to that account; the $7,000 draft to be credited for collection only, which "in banking parlance means that an item is not credited until you get the money for it" (pp. 23-4, 28). The discount clerk handed the money to the teller to be credited to the account of the Elmira Bank; handed the $7,000 draft to the collection clerk "to be entered for collection for account of" that bank; and handed the $15,012.50 check to the loan clerk, telling him that it "was to be used in paying the loan of $15,000, the balance due from Mr. Bush" (p. 33).

It is the custom of the defendant the Chase National Bank when a deposit is made to have "either a deposit slip or a letter of some sort handed in." The bank has a form which it fills out. These letters and deposit slips are preserved and kept among the papers of the bank. If no deposit slip is made out the currency, according to the usual custom, would appear as a credit in a certain book called the "duplex." In this case, however, no deposit slip or letter can be found, and the deposit of the $8,000 currency does not appear on the duplex (pp. 81-3). The $7,000 draft was entered, *not as cash*, but in a book indorsed "Time Collections" in the account which contained the original entries of the drafts deposited by the Elmira National Bank for collection. The entry is in the usual form of a collection, *and does not indicate that*

the sum, when collected, was to be devoted to any particular purpose. It does not appear that the $7,000 draft was entered on the duplex. The entry of the $15,012.50 check was made on the duplex as a charge to the Elmira Bank and was balanced by the credit to Bush of his loan and interest (p. 82). When subsequently collected on May 8, the $7,000 draft was credited to the Elmira Bank in its general account (p. 20).

The defendant the Chase Bank continued, and has ever since remained, in possession of Bush's note and collateral (pp. 26, 34).

The $7,000 draft in the form as deposited—that is, so altered as to be payable to "J. J. Bush, Cashier," instead of J. J. Bush, individually—was presented by the defendant to the Quaker City Bank for collection.. It was paid by that bank, as shown on its back.

On the books of the Elmira National Bank it had been credited to the Quaker City Bank and charged to the defendant—that is, the same entries were made as if it represented a mere transfer of funds from Philadelphia to New York. The charge of this draft to defendant was in the form "J. J. B. $7,000." The initials are those of Bush's name, but there is no entry of the amount on his account, as would be the case if the entry related to his individual business. The initials were put there for some purpose of identification, which is now impossible to ascertain by competent testimony (pp. 98–102). A possible explanation is afforded by the fact that the check was originally signed in blank and the amount filled in afterward, apparently at defendant's bank (p. 97); so that quite possibly the initials were intended to indicate the source of information as to the item entered. Mr. Porter admits that the draft as presented to the

Quaker City Bank bore no indication that it represented moneys drawn by Bush for his individual benefit. He says (p. 30):

> According to the customs of banking a check payable to the order of J. J. Bush, Cashier [Mr. Bush being Cashier of the Elmira National Bank], is exactly equivalent, I should think, to a check payable to the order of the Elmira National Bank. If the check was credited, it would make it that way to correspond with the endorsement. As a check so deposited in my bank I suppose it was substantially a check to the order of the Elmira National Bank and endorsed by the Elmira National Bank. I do not know of anything on that check to apprise the Quaker City National Bank that the check or draft was drawn for the individual benefit of J. J. Bush. If the word "Cashier" had not been added on the face of it, I do not know whether the Quaker City National Bank would or would not have known that it was drawn for the individual interest of J. J. Bush.

The facts were developed by examination of the monthly account and vouchers rendered by defendant to the Receiver on June 6. Thereafter the $15,012.50 was demanded and refused (pp. 20–1).

Bush's Prior Transactions.

The remainder of the testimony in the record relates to Bush's actions as cashier of the Elmira Bank prior to May 5, 1893, and in particular to the number of times he signed or may have signed bank drafts to his own individual order for his individual benefit. This evidence was introduced in the endeavor to show either actual or ostensible au-

thority to issue the Quaker City $7,000 draft, which upon its face was presumptively unauthorized and illegal. In other words, defendant undertook to show a prior "course of business" by Bush as cashier of the Elmira Bank, from which the jury might infer either that the directors of that bank had actually authorized, or knowingly permitted him to issue bank drafts to any amount in his own favor, or that the directors had been negligent in failing to discover his actions and put a stop to them.

This evidence was all introduced over our objection and exceptions, the grounds of which appear in our first specification of error.

Bush became cashier in January, 1890 (p. 35). The president, Jackson Richardson, also had the power to sign drafts (p. 62), and from early in 1891 until April, 1892, one C. C. Swan, a director and assistant cashier of the bank, also signed such drafts (pp. 87–9, 63). On July 1, 1892, one E. A. P. Smith was appointed teller and authorized to sign drafts in the absence of the president, vice-president and cashier. Mr. Smith was afterwards given the title of assistant cashier (pp. 63–4). Mr. Richardson and Mr. Smith are both dead (pp. 34, 95).

Mr. Gale, the Receiver of the Elmira Bank and plaintiff in this action, afforded to defendant's counsel the fullest facilities for examining the papers of the failed bank in search of any returned drafts that might have been drawn by Bush, as cashier, to his own individual order. Defendant's counsel did actually examine about one-half of these returned drafts, and Mr. Gale with the assistance of a clerk made two searches through all of them. It appeared that a considerable number of vouchers were missing. The

vouchers had been tied up in loose bundles prior to the time when the first Receiver of the bank took possession, and had probably not been looked at until shortly before this trial. Defendant's counsel, when Bush's deposition was about to be taken, wrote him asking him to produce before the examiner any checks which he might have drawn for drafts issued to his own order as cashier. This brought out the fact that Bush had some years before made a collection of papers for use at the trial of another case, which papers included the checks drawn for drafts issued to his own order (pp. 64, 76, 86–7, 89, 90, 93–4). All of these checks, together with all of the drafts to his own order which had been found by the searches above mentioned, were produced at the taking of his deposition, and a large number of them were admitted in evidence at the trial of the action. A number of the drafts and checks which had been admitted were subsequently excluded from the consideration of the jury, either because they appeared to have been used in the business of the bank and not Mr. Bush's individual business, or because they were not drawn to the order of Bush, and therefore could have given no indication to the auditing committee of the bank that they were for his benefit.

There were about 25,000 to 26,000 drafts in all (p. 94).

After this sifting process eight drafts remained, which had been signed by Bush as cashier and made payable to his own individual order, and which were stated by him to have been for his own benefit. They were all drawn on the Chase National Bank. They are as follows:

DRAFTS SUBMITTED TO JURY.

P. 43	Exh.	4	April	2,	1891	$170.83
44		5	Aug.	8,	1891	129.17
44		6	March	8,	1892	96.67
45		7	Feb.	17,	1891	35.07
46		8	Jan.	15,	1892	50.
48		10	Feb.	18,	1892	30.
49		11	May	6,	1892	5.
56		33	Feb.	15,	1893	77.50
						$594.24

There was also a draft to Bush's order for $30 on Feb. 11, 1893 (p. 94), which is missing. It does not appear who signed the draft, or for what purpose it was issued, and it was not referred to in the Judge's charge.

In addition to these eight drafts, there were the following checks drawn by Bush to the order of "Dft. to J. J. Bush" or "Dft. to order J. J. Bush," upon which checks it was admitted that drafts had been issued, drawn on the Chase National Bank, which drafts have been subsequently lost. It did not appear whether or not these drafts were signed by Bush as cashier, and as to three of them it affirmatively appeared that some drafts drawn on the same day were signed by Swan, the assistant cashier (pp. 88–9). The checks are as follows:

CHECKS SUBMITTED TO JURY.

P. 73	Exh. 54	Aug. 31, 1891		$100.
73	55	Sept. 30, 1891		306.67
73	56	Dec. 31, 1891		306.67
74	60	June 6, 1892		769.03
				$1,482.37
			Drafts,	594.24
				$2,076.61

Bush stated that in general he drew drafts in his own favor whenever he needed them (pp. 41–2), but did not state that he needed or drew any other drafts to his own order than the ones which were actually in evidence; and the search through the original papers had been so complete that the trial Judge was of the opinion "that all the papers pertaining to Bush's drafts to his own order * * * have been searched out * * * and that you have about the whole story" (p. 115).

As to all of the drafts drawn to his own order Bush testified that he made no attempt to conceal the fact that he was drawing them; that they came regularly back to the bank and were kept among its vouchers, and when not lost were handed over to the Receiver; that they were open to the inspection of any director or officer who desired to examine them (pp. 40–1, 78). He was then asked whether any objection was ever made by anyone to the issuing or using of any of these drafts. This was objected to on the ground that it was not proved that any of these drafts came to the knowledge of the directors of the bank. The objection being overruled, he answered: "Not that I ever heard of" (p. 42).

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At a later period of the trial it appeared affirmatively that the auditing system of the bank was not of such a character as to disclose to the directors the fact that drafts issued to the order of Bush were signed by himself as cashier. The auditing committee of the directors was known as the "Examining Committee," and among its duties were "to exercise a supervision of the business of the bank, and to examine every three months the affairs of this bank, count its cash, compare its assets and liabilities with the amounts in the general ledger," and report to the board of directors at the next regular meeting. The acting members of the Examining Committee for the years 1891 and 1892 appear by the minutes to have been J. B. Coykendall and Frederick H. Richardson. The third member does not appear to have acted for those years. Messrs. Coykendall and Richardson were re-elected as two of the members of the committee for 1893, but the bank failed before the time for them to report for that year (pp. 62–4, 85). The deposition of Mr. Coykendall was taken in this case and read to the jury. He confirmed the statement that Mr. Richardson and himself were the active members, and testified that they were always present at the auditing, which was done every two or three months. Mr. Coykendall's. description of the auditing is as follows (p. 84) :

> We first took the notes and tabulated them and added them up, and then added to that amount the various notes that had been sent off for collection, for rediscount, to see if they balanced with the discount ledger—I mean the notes of the various persons that had been discounted at the bank. We then counted the cash to see that it agreed with the balance. That was the main part

of it. There were no other steps that I remember.

Q. Did you ever examine any of the returned drafts from the Chase National Bank, or other corresponding banks?

A. No, sir.

Q. Did you ever examine any of the checks of the depositors in the bank?

A. No, sir.

Q. Did you ever have your attention called in any way to the question which officer of the bank signed these drafts on other banks?

A. No, sir.

Q. Did you ever have any conversation with Mr. Bush as to whether or not he was signing drafts to his own order?

A. I knew nothing about that at all. No, sir.

Q. So far as you were aware, was there ever any conversation by any of the directors of the bank in reference to this matter?

A. Not that I was aware of; no, sir.

Mr. Bush's deposition on the same subject was read in part by defendant on the trial as follows (p. 77):

> The examining committee was the committee which did the auditing of the books and papers of the bank, independent of the loan committee. I sometimes have seen that examining committee at work. They started by counting the checks and the cash items, and then I have seen them look at the depositor's ledger and the various books of the bank.

Defendant's counsel dropped the subject at this point. It was subsequently taken up by the plaintiff and continued as follows (p. 79):

Q. What else?

A. I should say that that was about the extent

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of their examination. I think the loan committee took charge of checking up the loans, so I don't think there was any other work for the examining committee. I never saw the examining committee examine the bundles of returned drafts from the Chase National Bank, or any of them, or bundles of returned drafts from any other bank, or the bundle of checks from any depositor. I never saw any director examine any of the checks of the depositors, or any of the drafts of our bank on other banks. There was no conversation between me and the directors of the bank at any time as to who signed any particular draft given by the Elmira National Bank on any other bank. I never saw any director of the Elmira National Bank look to see who signed any such draft.

There was no stub book of drafts on the Chase National Bank. Instead there was kept a "draft record." This book did not preserve the names of the payees of the drafts drawn until October, 1892. Subsequent to that time it showed only two drafts to Bush's order, of the amounts of $30 and $77.50 respectively. There were 5,987 drafts issued and shown by the book during this short period (p. 94). To learn of the other drafts above set forth it would have been necessary for the directors to go through the bundles of Bush's checks before their return to him, or through the bundles of returned vouchers from New York.

Defendant's counsel attempted to show that Bush ran the Elmira Bank without supervision, but was unsuccessful (pp. 51–2). He was permitted to show, against plaintiff's objection, that the Elmira Bank management was loose in the matter of permitting overdrafts, both to Bush and to other customers.

Specification of Errors.

The questions which I desire to bring to the attention of this Court will sufficiently appear from the following rulings (the numbering being that of the assignments of error):

VII (pp. 37–9). In permitting the defendant to read from the deposition of the witness J. J. Bush, over objection by plaintiff on the grounds hereinafter stated, the following question: "Mr Bush, you drew other drafts as cashier of the Elmira National Bank to your own order besides the $7,000 Quaker City draft which has been mentioned, did you not?" To which the witness answered, "Yes, sir." The above question is objected to on the following grounds: (1) As immaterial and incompetent as against the Elmira National Bank; (2) that it cannot be any evidence of a course of business, because it does not appear that any of them came to the attention of any of the directors of the bank; (3) that it is no evidence of any course of business, because the directors of that bank could not lawfully have given Bush any general power to issue drafts in his own favor for his individual debts; (4) because no evidence as to prior drafts as to Bush's individual order would justify the draft in question, which is admitted to have been payable to Bush as cashier, that is, to the Elmira National Bank, when received by the defendant; (5) that the defendant was put on notice and inquiry as to the true ownership of the $7,000 draft by this endorsement by Bush as cashier, and as it made no inquiry it is not in a positon to appeal to any course of business as to drafts to Bush's individual order, were it conceded that such a course of business existed; (6) that the defendant, by presenting this

$7,000 draft for payment to the Philadelphia bank represented to that bank and to the Elmira National Bank that it represented a mere transfer of funds of the Elmira Bank from Philadelphia to New York, and is estopped to assert the contrary; (7) on the ground that the whole transaction testified to by Porter was irregular and outside of any coure of business, and that, therefore, cannot be sustained by any proof as to a course of business; (8) that the only evidence by which the defendant could to any extent be relieved from liability to repay the whole amount would be evidence that the $15,000, or some part thereof, was not the property of the Elmira National Bank, and that is neither pleaded nor proved.

XII (p. 43). In receiving in evidence, over objection by plaintiff that it is immaterial, that it never came to the knowledge of the directors of the bank, and that it is for too trivial an amount to form any precedent for a draft of $7,000, the draft of the Elmira National Bank on the Chase National Bank, signed by J. J. Bush, cashier, to the order of J. J. Bush, for $170.83, marked Exhibit 4.

XIII (pp. 43–8). In receiving in evidence, over objection by plaintiff that they are immaterial, that they never came to the knowledge of the directors of the bank, that they are for too trivial amounts to form any precedent for a draft of $7,000, the following drafts of the Elmira National Bank on the Chase National Bank, each signed by J. J. Bush, cashier, to the order of J. J. Bush, each being separately objected to and separately assigned for error:

(a.)	The draft for		$129.17,	marked	Exhibit	5.
(b.)	"	"	$96.67,	"	"	6.
(c.)	"	"	$35.07,	"	"	7.
(d.)	"	"	$50,	"	"	8.
(e.)	"	"	$100,	"	"	9.
(f.)	"	"	$30,	"	"	10.

XIV (pp. 45–49). In receiving in evidence, over objection by plaintiff that it is immaterial, that it never came to the knowledge of the directors of the bank, and that it is for too trivial an amount to form any precedent for a draft of $7,000, the draft of the Elmira National Bank on the Chase National Bank, signed by J. J. Bush, cashier, to the order of J. J. Bush, for $5, marked Exhibit 11.

XXVII (p. 103). In denying plaintiff's motion at the close of the testimony herein for the direction of a verdict for the plaintiff for the full amount claimed.

XXXI (pp. 107, 116). In charging the jury as follows: " But the plaintiff in attempting to establish bad faith takes the burden of proof."

XXXIII (pp. 110, 116). In charging the jury as follows as to drafts of dates prior to May 5, 1893, drawn by Bush and submitted to the consideration of the jury: " Providing such acts had been done for a period sufficiently long to establish a settled course of business it may be inferred from the general manner in which they have been done that such acts were known *or ought to have been known* by the directors, and that the cashier had authority;" the error particularly assigned, being the inclusion of the words " or ought to have been known."

XXXIV (pp. 110, 116). In charging the jury as follows: " The question turns upon an implied authority which *is to be inferred* from the *proved* acquiescence

of the Elmira Bank in Bush's prior assumption of authority," there being no proof that the directors knew of such assumption.

XXXV (pp. 111, 116). In charging the jury as follows as to the failure of his directors to object to Bush's having signed said prior drafts: "This acquiescence is derived from their actual knowledge *or from what should have been their knowledge* of the conduct of the course of business of the officers. In this case no actual knowledge has been proved, but the point in the case is the inference to be derived from what the directors *should have known* by a proper examination of the course of business of their cashier."

XXXVII (p. 116). In refusing to charge as requested by plaintiff as follows: "Plaintiff is entitled to a verdict for the amount of $7,012.50, with interest thereon from May 5, 1893, at the rate of 6 per cent. per annum."

XXXVIII (p. 117). In refusing to charge as requested by plaintiff as follows: "If the jury find that the transaction of May 5, 1893, as testified to by Mr. Porter, was not in the ordinary course of business, then they must find a verdict for the plaintiff in the full amount claimed, unless they are also of the opinion that the circumstances were not such as would lead a man of ordinary prudence in Porter's position to make inquiry about the ownership of the currency."

XLI (p. 117). In refusing to charge as requested by plaintiff as follows: "If the jury find that Porter's suspicions were aroused as to the true ownership of this currency, then, since he failed to make any inquiry, defendant must fail as to this defense, and plaintiff is entitled to a verdict for the full amount claimed."

XLIV (p. 118). In refusing to charge as requested by plaintiff as follows: "The certification of the $15,012.50 check by Bush was a crime under the laws of the United States, and this was known, or ought to have been known, to both Bush and Porter."

XLVIII (p. 119, see pp. 57–8, 111–2). In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration the draft of March 1, 1893, on the Hide and Leather National Bank in favor of M. L. Greider for $600."

LI (p. 119). In refusing to charge as requested by plaintiff, as follows: "The burden is upon the defendant to establish, by a preponderance of evidence that there was a well settled course of business in the Elmira National Bank, authorizing Bush to draw drafts as cashier to his own individual order, without regard to amount, *and that this course of business was actually known to the directors of said bank;* if defendants have failed to prove this by a preponderance of evidence, the jury must find a verdict for the plaintiff upon this issue."

LII (p. 119). In refusing to charge as requested by plaintiff as follows: "The jury are not to take into consideration any one of the prior drafts or checks which are in evidence, unless they find that defendant has established by a preponderance of evidence *that the directors of the bank knew* that a draft was then issued by Bush for his individual benefit, and signed by himself."

LIII (p. 120). In refusing to charge as requested by plaintiff as follows: "If the jury in the case of any one of these prior checks or drafts find that the amount is too small to constitute a precedent for the subsequent issuance of a $7,000 draft by Bush as cashier to

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his individual order for his individual benefit, then such check or draft must be left out of consideration."

The Pleadings and Issues.

Defendant having paid the balance of the account as rendered by it on June 6, plaintiff sued for the amount withheld on account of the improper item of $15,-012.50; and proved the impropriety of this item by identifying it with the check of that amount set forth in the complaint, which check by the uncontroverted allegations of the complaint, was illegally certified because it was (1) drawn to the order, and used to pay the personal debt, of the certifying officer, (2) certified away from the bank on which it was drawn (and as subsequently appeared, without prior entry on that bank's books), and (3) payable away from the bank on which it was drawn.

Having proved demand and refusal, and tendered the check, plaintiff rested.

Defendant never seriously supported the $15,012.50 check, or seriously urged that plaintiff was not entitled to the $12.50 judgment which the Court directed, but relied upon a defense which at the trial appeared to be a defense in mitigation of damages, although the answer, verified by Mr. Porter, was so drawn as to conceal this, thus somewhat befogging the issues. The defense as pleaded and offered at the trial was not that the $15,000 belonged to anybody but the Elmira Bank, but that they "apparently" belonged to Bush.

ARGUMENT.

I.

Bush's certification of the $15,012.50 check was illegal, and plaintiff was entitled to judgment for that amount upon the facts admitted in the pleadings, unless some affirmative defense could be established.

This point requires but very brief treatment, as it rests upon principles never doubted, which have received the assent of the Courts below.

The check was of course an obligation of Bush alone until duly certified by the Elmira Bank; nor could it be charged to that bank without presentation at Elmira, unless the certification was in such form as to make it duly payable elsewhere. It was therefore only necessary for the plaintiff to show that the certification was presumptively illegal. This he showed by the admissions in the answer and upon these grounds:

FIRST. The principal's name was signed by the agent for his own personal benefit. These facts were known to the defendant, which does not claim that the directors of his bank were consulted either then or afterwards, or that there was any prior course of business giving color to such a transaction. Lack of authority is presumed.[1] It was unnecessary to prove the state of his account at the moment.[2] Of course, defendant was at

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[1] 1 Morse on Banks and Banking (3d ed.) p. 323; Claflin vs. Farmers' and Citizens' Bank, 25 N. Y., 293, 294-5, reversing s. c., 36 Barb., 540; Gale vs. Chase Natl. Bank, 104 Fed. Rep., 214; and cases cited under Point II., *infra;* Huffcut on Agency, § 115.

[2] 1 Morse, *ut sup.;* Corn Exchange Bank vs. American Dock Co., 149 N. Y., 174, 180-1; Lamson vs. Beard, 94 Fed. Rep., 30, 39; Claflin case, *supra*, at p. 295.

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liberty to prove, if possible, that plaintiff has or could have been made whole ; but that does not depend upon the state of the cashier's account at the moment, when plaintiff was unaware of the certification.

SECOND. It was signed two hundred miles away from his bank, in another city[1] ; and in defendant's proof it subsequently appeared that, as the party asking for and obtaining the certification well knew at the time, it was signed without being first " regularly entered to the credit of the dealer upon the books of the banking association[2]." Had it been so entered, being for so large an amount, it would quite likely have reached the ear of the directors.

THIRD. It was made payable elsewhere than at the bank upon which it was drawn. A cashier has no such authority by virtue of his office, and it is in violation of the provision of Section 5190 of the Revised Statutes that the usual business of a bank should be transacted at its office[3]. Such an act is not in the regular course of business, even when done for the bank's supposed benefit and on notice to its directors. Had it not been made payable at defendant's office, defendant would doubtless have promptly presented it at Elmira.

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[1] 1 Morse on Banks and Banking (3d Ed.), pp. 352-4; Bullard vs. Randall, 1 Gray, 605, SHAW, C. J. The remarks to the contrary in Merchant's Bank vs. State Bank, 10 Wall., 604, 650-1, were not necessary to the decision (p. 644), and were the subject of vigorous dissent (p. 676).

[2] Act of July 12, 1882, Ch. 290, § 13 (1 R. S. Supp., 357). This section, while making its violation a crime, does not validate the check, as does Rev. St., §5208 under other circumstances, nor is it necessary that the offense be " wilful." Spurr vs. United States, 174 U. S., 728, 734.

[3] Armstrong vs. Second Nat'l Bank, 38 Fed. Rep., 883, 886.

II.

Laying out of consideration the evidence as to the alleged course of business permitting Bush to draw checks to his own order, for his own personal benefit, the transaction between Bush and Porter was illegal, and is no defense to this action.

There are various arguments that appear to me to be conclusive in support of this proposition. I shall reserve all but one of them for the next point, to which they are equally applicable, and confine myself at present to a discussion of the premise upon which defendant's whole position rests—that Porter was justified in assuming the $7,000 draft produced by Bush to have been the latter's individual asset, which he could rightfully apply to his individual debts.

Porter testifies that this $7,000 draft, when first tendered him by Bush, was to Bush's individual order, and that the word "cashier," which made it appear to be the property of his bank, was added thereafter. This was disputed by us upon the trial, but the Court substantially charged the jury to believe his story, and we shall assume it to be true[1].

The draft, it will be borne in mind, was signed by Bush himself, as cashier of his bank.

Defendants upon the first appeal to the Circuit Court of Appeals contended that upon its face, and irrespective of any prior course of business, the draft was presumptively a document duly issued and not calling for inquiry. This contention, although overruled, we suppose will be renewed at this Court.

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[1] Record, pp. 29-30, 97-8, 108.

There can be no dispute that a bank cashier is an agent of the bank; nor that an agent's general authority does not presumptively include the right to sign his principal's name for his own benefit; nor that, as a corollary to this, a party to whom the agent offers a paper so signed, in payment of his own debt, is put upon inquiry. With the exception of certain remarks in a New York case which we shall discuss, the Federal and State Courts are a unit upon all of these points. They are applied to this case of a cashier's draft to his own individual creditor;[1] to a cashier's indorsement, as cashier, of his own individual note;[2] to a bank officer's certification of his own check;[3] to a bank president's official letter directing his individual note to be charged against the bank;[4] to stocks or bonds issued by corporate officers for their own benefit;[5] to negotiable paper issued by agents other than bank officers;[6] and to *quasi* negotiable paper so issued.[7] It is the same rule which puts on inquiry

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[1] Anderson vs. Kissam, 35 Fed. Rep., 699; Lamson vs. Beard, 94 Fed. Rep., 30; Gale vs. Chase Natl. Bank, 104 Fed. Rep., 214; Campbell vs. Manufacturers' Bank (N. J.), 51 Atl. Rep., 497 (printed in the supplement to this brief).

[2] West St. Louis Bank vs. Shawnee County Bank, 95 U. S., 557, 559.

[3] Cas. cit. under I, *supra*.

[4] Chrystie vs. Foster, 61 Fed. Rep., 551; State Bank vs. Newton Bank, 66 Fed. Rep., 691.

[5] Moores vs. Citizens' Bank, 111 U. S., 156; Germania Safety Vault Co. vs. Boynton, 71 Fed. Rep., 797; Farrington vs. South Boston R. R., 150 Mass., 406.

[6] Gerard vs. McCormick, 180 N. Y., 261; Rochester Turnpike Co. vs. Paviour, 164 N. Y., 281; Park Hotel Co. vs. Fourth National Bank, 86 Fed. Rep., 742 and cas. cit. by SANBORN, J.; Atlantic Mills vs. Indian Orchard Mills, 147 Mass., 268, 276; Third Nat'l Bank vs. Maine Lumber Co., 44 Minn., 65, 67; Porter vs. Winona Co., 78 Minn., 210, 213; Camden Co. vs. Abbott, 44 N. J. Law, 257.

[7] Bank of New York vs. American Dock Co., 143 N. Y., 559; Corn Exchange Bank vs. Same, 149 N. Y., 174.

every one who takes through such a signature as "A. B. trustee."[1] As stated by Chief-Justice WAITE in West St. Louis Bank vs. Shawnee County Bank at 95 U. S., 559: "The very form of the paper itself carries notice to a purchaser of a possible want of power to make the endorsement, and is sufficient to put him on his guard." In the leading case of Claflin vs. Farmers' & Citizens' Bank, 25 N. Y., at pp. 294-5, it was agreed by all the Judges that the agent's signature did not bind the principal when the other party knew that it was for the agent's benefit. The only point of controversy was whether an ignorant holder could recover when the paper was negotiable. But "the want of authority," said Chief-Judge SELDEN, "to bind the bank appeared upon the face of the check."

I do not set out those authorities at length since they are so familiar and because this was so recently done in a case twice argued at this court (Phelps vs. Beard, October Terms, 1900 and 1901, on error to Lamson vs. Beard, 94 Fed. Rep., 30), and because on the reargument the correctness of our position was substantially conceded, as shown by the briefs filed.

No inquiry was made by Porter as to Bush's authority, even of Bush himself; nor would inquiry of Bush have been enough.[2]

A special exception to these general rules, however, was suggested by Judge PECKHAM in the opinion

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[1] Shaw vs. Spencer, 100 Mass., 302; Scollans vs. Rollins, 179 Mass., 346, 353.

[2] Bank of New York vs. American Dock Co., 143 N. Y., 559, 565-6; Manhattan Life Ins. Co. vs. Forty-second St. R. R. Co., 139 N. Y., 146, 151 and cas. cit.; Germania Safety Vault Co. vs. Boynton, 71 Fed. Rep., 797, 799 and cas. cit.; Dowden vs. Cryder, 55 N. J. Law, 339, 332.

of the New York Court of Appeals in Goshen National Bank vs. State of New York, 141 N. Y., 379. This suggestion was relied upon by defendant at the early stages of this litigation, and I shall discuss it somewhat at length, although it has been recently the subject of extended arguments in this Court in the case of Phelps vs. Beard, since compromised. The suggestion is that a cashier's draft or cashier's check—that is, a check drawn by one bank upon another and signed by the cashier of the former on its behalf, is an instrument so common, and partaking so much of the nature of currency, that people ought not to be expected to examine the signature for the purpose of ascertaining whether it is signed by a person who is using it for his own individual benefit. The exact language upon this point is as follows:[1] "Bank or cashier's drafts are used so enormously at the present time in the payment or settlement of debts and in other commercial transactions that they have almost acquired the characteristics of money. So long as they are drawn on behalf of a solvent bank and upon a solvent drawee, and signed by one of the officers usually signing such instruments, they are regarded by the commercial community very much the same as so much cash."

The reasoning of this case was at first thought possibly to indicate that the prior New York decisions upon the authority of bank officers and other agents to sign in their own interest were overruled, and the similar decisions of this Court disapproved. A few months later the same Court however, speaking by the same learned Judge, approves the earlier cases and places the Goshen Bank case upon a "difference in the

[1] 141 N. Y. at p. 387.

case of bank or cashier's drafts from most other cases of agency."[1]

That the remarks quoted from the Goshen Bank case were not the outcome of a very careful examination of the question involved seems to have the following indications:

First, as has since judicially been pointed out,[2] the remarks were *obiter*. The record contained a finding of fact that the cashier had authority to sign the checks, and this (assuming, as the Court did, that such authority could lawfully be given) was fully sustained by the proof, as was pointed out after an examination of the record by the New Jersey Court of Errors and Appeals in the Campbell case.

Second, the remarks of the Court are not sustained by the precedent there cited,[3] which was an action by an indorsee, and lacked the element of notice to the plaintiff that the paper was issued for the cashier's personal benefit.

As the question is one of general commercial law, this court would not be bound even by a decision of the New York courts directly in point, although it was a transaction within that State.[4]

It is respectfully submitted that there is no difference between the position of a bank cashier and that

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[1] Bank of New York case, 143 N. Y., at pp. 564-5.

[2] *Id*; Lamson vs. Beard, 94 Fed. Rep., at p. 42; Gale vs. Chase Natl. Bank, 104 Fed. Rep., at pp. 216-17; Campbell vs. Manufacturers' Bank, herewith submitted, at pp. 12-13.

[3] Phillips vs. Mercantile Natl. Bank, 140 N. Y., 556.

[4] Swift vs. Tyson, 16 Pet. 1, 18,19; Oates vs. Natl. Bank, 100 U. S., 239, 246; Pana vs. Bowler, 107 U. S., 529, 541.

of any other agent which can justify an exception to the general rule that an official signature affixed for the benefit of the signer is a danger signal, and puts the recipient upon inquiry.

In the first place, the general rule is not less necessary in the case of a bank cashier than in that of other agents, but more so. His opportunities to abuse so dangerous a privilege are not less, but greater. The probability of early discovery is certainly no greater. In actual experience, embezzlements that would be prevented by strict observance of the rule are certainly no less familiar. As said by Judge WOODS in Lamson vs. Beard, 49 Fed. Rep., at page 43: "We agree with counsel for defendants in error that the concern of the courts should not be to make it easy for persons in fiduciary positions to make way with that which is committed to their care by relaxing this salutary rule through considerations of the supposed necessities of business and commerce, and that the rule should not be suspended where the opportunities for breach of trust are largest, merely because they are large. The best public policy requires that bank officers be rigidly held to the ordinary and well established rule."

In the second place, however common and necessary are cashier's checks, the establishment of such an exception would not appreciably quicken their use in commerce. The signature must always be exa[illegible]d, for the bank issuing the check is not bound if the wrong name is signed, or if the signature is forged. The personality of the cashier must be always presented to the mind of the recipient of the paper, and the fact that it is issued in the cashier's own interest,

if known to the recipient, must also be in mind. On the other hand, it is perfectly easy for a bank to provide that checks issued for the benefit of the cashier should be signed by some other officer.

In the third place, there is no custom of receiving such checks, which would be disturbed by a present decision applying to them the general rule of agency. The invalidity of such a custom, claimed then to exist in New York, was many years since declared in a familiar opinion, often since quoted and approved.[1]

I venture to think, moreover, that no member of the Court which decided the Goshen case would have applied it to the present state of facts.

In the first place, the ground there assigned for distinguishing cashier's checks from other negotiable paper is their use as currency, like bank notes. The idea of the Court seems to be that such checks are received through clearing-houses, by mail or express, or by messenger, in such quantities that the person receiving them is not to be expected to have in mind the personality of the cashier who signs them, so as to connect in mind the signature of the check with the personal responsibility for the obligation which is being thereby liquidated. The Goshen case was a very strong one for the recipient, since the obligation liquidated by the cashier's check was that of the County of Orange to the State of New York, so that the person receiving and depositing it on behalf of the State Comptroller would be very apt to forget that the County Treasurer of Orange was personally respon-

[1] Anderson vs. Kissam, 35 Fed. Rep., at pages 701, 703; reversed on another point 145 U. S., 435.

sible for the money owed, and that he was also the cashier who signed the check. Under circumstances like those in the present case, there is no reason why a cashier's check should be differentiated from any other paper signed by an agent in his principal's name for his own benefit.

In the second place, the cashier's check in the Goshen Bank case had come back to the bank in due course and had been paid. This was the main point of the decision, the Court regarding the transaction as thereafter equivalent to an attempt by the bank to recover back cash paid out of its till. In the case at bar, the draft never came back to the Elmira Bank until after it had failed ; and the Receiver thereupon disavowed it and demanded the money.

Had the Court not treated the transaction as equivalent to a payment in currency after the draft was received and paid by the Goshen Bank, it would probably have decided in favor of the plaintiff on the ground that the State was not a holder for value parted with. The New York distinction between a holder for value in general and a holder for value parted with has not been recognized in the Federal Courts, but it is respectfully submitted that if this novel doctrine as to cashier's checks is to be adopted, it is to be adopted with the restriction which would have been placed upon it by the Court which conceived it. It would certainly be a monstrous doctrine to hold that if a bank cashier owes money, and without authority sends the check of his bank in payment, and the bank never recognizes his act, but the fraud is discovered before the check is returned by the payee, and if the payee meanwhile has parted with no value, but retains in his possession the cashier's evidence of indebtedness and

collateral securities—to hold that under these circumstances the bank must pay the debtor and settle the loss. Yet that is precisely this case. Bush's original note and securities are in the possession of the defendant.

III.

Assuming the existence of a course of business sufficient to permit defendant to treat Bush as having general authority to sign cashier's checks for his individual benefit, the transaction is still illegal and the defense still fails.

It is not pleaded or proved, or claimed to be proved, or claimed to be the fact, that the Elmira Bank ever was paid or recouped in any way any part of the $15,012.50 thus withheld by the defendant, or that any of its officers or directors, other than Bush, knew of this transaction.

Defendant's claim is that Bush used the Elmira Bank account as a mere conduit through which to pass $8,000 of currency which had no earmark, and a $7,000 check of which he was apparently the owner, and that by some kind of legal reasoning the Elmira Bank was thus affected with a loss of these amounts, which really belonged to itself, as well as of the $12.50 which the defendant allowed to Bush, (apparently as a gift or commission upon the transaction).

I understand the correct analysis of the transaction, considered by itself and apart from any prior doings of Bush, to be as follows:

(a) Defendant must treat the whole transaction of May 5, 1893, including the deposits and the certified check, as a unit.

This is its own theory, set forth in an answer based indeed upon not entirely accurate information, but drawn by its attorneys with evident care,[1] and in the light of previous litigation on the subject.[2] The theory is necessary to its case, for in no other way could it claim to get these large amounts, admitted to have been put by it into the Elmira account, out of that account again.

Judge SHIPMAN, in charging the jury, adopted precisely the opposite theory, saying[3]: "I put the case as though when Bush came in with his bag containing $8,000 in currency and $7,000 in a draft, those two, the currency and the draft, had been received by Porter and credited upon the note, and this form, this illegal, improper form of taking Bush's individual check and having it certified by himself as cashier, had not been gone into."

I submit that this theory, which underlies the entire charge to the jury, is untenable, not only because it is inconsistent with the answer, but also because it is inconsistent with the facts and the law.

The first trouble with the learned Judge's theory (apart from its inconsistency with that to which the defendant had deliberately committed itself) is that, far from receiving the currency and the draft and crediting them upon the note, *Porter did not accept the tender. He rejected it.* He rejected it because he would

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[1] Record, p. 12.
[2] pp. 15, 30, 98.
[3] p. 106.

not permit his own bank to accept the draft as the equivalent of cash. This was not on account of the irregularity on the face of the draft, but because it was drawn on a bank in Philadelphia, which he refused to credit. Having elected at the time to refuse the proposition which it claims Bush made, the bank cannot now retrace its steps.

Furthermore, if the entire transaction is not to be regarded as a unit, then the result is that there were two different transactions, one by which certain assets of the Elmira Bank were deposited in the Elmira Bank account, and the other by which a check against that account was certified. The latter transaction is admitted to be "illegal, improper." It therefore falls, and the former alone remains.

It was this peculiar theory of the judges below which caused them upon the first writ of error in this case to hold that a verdict should have been directed in behalf of the plaintiff for the sum of $7,012.50 only.

The plaintiff joins with the defendant in contending that the transaction testified to by Porter, if considered at all, is to be considered as a unit. Plaintiff absolutely disavows the transaction and demands his rights upon that theory. Plaintiff is entitled to the moneys which were unlawfully taken and withheld from the Elmira Bank.

(*b*) The best evidence of the real transaction is of course to be found in the entries of it upon defendant's books, made at the time, and in the original papers. The entries, together with an explanation of the bank's system of bookkeeping, are to be found at pp. 20, 81, 82, 83.

The entries are indeed not complete. There ought

to be a deposit slip, a deposit letter, or a cash entry upon the duplex book, but there is none. Enough is to be found, however, to destroy defendant's case.

The date of the transaction, as fixed by Porter, was May 5. On that day the Elmira Bank is credited in the general account with $8,000 currency (of which amount there is no original entry), and debited with a $15,012.50 draft (which is shown by the duplex book to have canceled Bush's note). *These are the only cash entries of that day with reference to the transaction.* At the end of that day, therefore, the books showed that the Elmira Bank had deposited $8,000 currency, and had given Bush a draft for the purpose of paying his debt to the defendant. There was no entry connecting the currency with the draft in any way, or indicating that the deposit of the currency was for any special purpose.

On the same day appears a $7,000 entry in a book endorsed "Time Collections," containing "the original entries of drafts deposited by the Elmira National Bank for collection." Here again there is nothing connecting the entry with the $15,012.50 draft, or indicating that the deposit was for any special purpose. A subsequent entry on the collection book shows that the item was "paid May 8." On that day for the first time it was credited to the Elmira Bank in the general account. Porter gives his explanation of the matter in his testimony.[1] He says: "Collection in banking parlance means that an item is not credited until you get the money for it." Otherwise, he says, the bank would be paying interest on an item which is not yet

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[1] Record, pp. 28–9; and compare Metropolitan Bank vs. Loyd, 90 N. Y., 530.

cash in its treasury. In other words, *the $7,000 entry was not a balance against the $15,012.50 entry, since in that case there would have been no mistake in crediting it the same day, and letting it draw interest for the same period.*

This $7,000 item was the draft on the Quaker City Bank, and examination shows that it was payable to the order of Bush as cashier, not individually—in other words, that it was upon its face, and was represented by defendant to the Quaker City Bank to be, the property of the Elmira Bank.[1]

No $12.50 entry of credit to the Elmira Bank is to be found.

Thus there is nothing on the books showing that the $15,012. 50 debit was balanced by, or connected with, any of the items of credit whatsoever; that it represented any special deposit, or was part of any conduit.

The allegations of the answer were thus contradicted by the proof offered in their support, and in the absence of help from its books the defendant offered the singular story told by its late vice-president, Mr. Porter, which we have very fully set forth in our statement of the case.

(c) The defendant is bound by its own book entries. It elected how to treat the transaction, and can no more change its position after the insolvency of the other party than it could revoke an election between contract and tort, or an election as to the appropriation of a payment.

(d) The transaction as testified to by Porter was unauthorized.

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[1] Record, pp. 25, 30; Bank of Genesee vs. Patchin Bank, 19 N. Y., 312.

In the first place, there can be no doubt that no cashier is authorized to agree that his bank's account be used without its consent to pass anybody's checks through for his own benefit, or indeed for the benefit of anybody else, when the bank is not interested in the transaction. Hence Porter's proposition was one which Bush had no right to accept.

Nor had Porter any right to permit such manipulation of the account of a depositor. No bank has the right to allow a depositor's account, without his permission, to be drawn upon by somebody else. A depositor's funds can be paid out "only in the usual course of business and in conformity to his directions;" only "at the time when, to the person whom and for the amount authorized by him."[1] A depositor has the right to insist that his account with the bank shall not be obscured or complicated by being used for the convenience of other people's pecuniary transactions, without his own consent; and that he shall not be obliged to examine and audit other people's pecuniary transactions and vouchers in which he has no interest. A single transaction of this kind would probably occupy as much of the depositor's time and mental effort as all the other transactions in his account for the period of audit.

To allow one individual to tamper with another individual's bank account is not a bit more objectionable than to allow a bank cashier for his individual advantage to tamper with the account of his bank. No such

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[1] Crawford vs. West Side Bank, 100 N. Y., 50, 53; Citizens' Bank vs. Importers' & Traders' Bank, 119 N. Y., 195, 200; Shipman vs. Bank of the State of New York, 126 N. Y., 318, 326-7; 2 Daniel on Negotiable Instruments, Sec. 1613; Smith vs. Brooklyn Savings Bank, 101 N. Y., 58, 60.

transaction can be regarded as in the course of any lawful business. Both parties to it act at their peril. We concede of course that, as this Court remarked, the Elmira Bank could not afterward recover from defendant the amounts deposited, if they had really belonged to Bush. This would not be, however, because its rights had not been violated, but because it had suffered no damage. The transaction still, as this Court said, " would have been irregular "—that is, would have been outside the due course of business, and a breach of the contract between the two banks.

I have not found any record of its ever before being claimed that a bank could permit other persons than the depositor to draw moneys out of the account. If other persons persuade the bank teller that they have oral authority, and if he yields to their persuasions, it may be that the depositor will ratify his act. and absolve him and the bank from liability for the irregularity. But if neither prior authority nor subsequent ratification be shown, the bank is responsible to the depositor.

The Courts below seem to have thought that each deposit in a bank account lies separate from each other deposit, and can be drawn off separately. Hence they infer that the $7,000 and the $8,000 put in by Bush lay upon the rest of the account like the upper layer of a *pousse café*, so that they could be drawn off from the top of it without disturbing the depositor at all or his prior deposit (except the $12.50 which somehow came off too).

This, I submit, is not the legal result of a bank deposit. Every deposit in an account, when it is accepted by the bank as cash, becomes the property of the bank, which becomes the debtor of the depositor to that amount ; but the debt does not remain a separate

one. The amount deposited is simply added to the general indebtedness of the bank, nor have I been able to find any precedent for its separate recovery by the depositor.

Defendant's counsel argue that if Smith is allowed to deposit money in Jones' account without Jones' knowledge, Jones cannot claim that it becomes his money; and that if Smith is allowed to draw it out again, signing Jones' name to the check by himself as attorney, Jones cannot claim that his funds have been diverted. It may be that Smith can get his money back in some way or other, notwithstanding that his payment is voluntary and therefore not recoverable on the ordinary lines of an action for money had and received, and notwithstanding that such a check would be little better than a forgery. It is sufficient for the purposes of the present case to say that the whole proceeding is so gross a violation of business and legal proprieties that the bank is not protected if Smith be an embezzler, and that Smith can certainly in no form of action, and by no kind of check, be able to get out any money *that is not his own.*

In the second place, sufficient funds were not deposited by Bush to balance the amount withdrawn, for three days thereafter the account remained $7,012.50 short.[1] Ever since it has remained $12.50 short, as the trial Judge conceded in directing the verdict.

If a bank may permit Smith, its favored friend, to draw $7,000 from the interest-bearing account of Jones, its depositor, without Jones' consent, for three days, may it do so for a year? If not, where is the line to be drawn?

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[1] See *supra*, p. 35.

If it may permit Smith to help himself to $12.50 out of Jones' account, may it let him have $1,250? If not, where is the line to be drawn?

In the third place, risk was cast upon the Elmira Bank, without its consent, which defendant was unwilling itself to run.

In this case the risk forced upon the Elmira Bank without its consent or knowledge was the risk of collection in panic times from a bank whose solvency, or at least immediate solvency, was doubtful. The fact that, as it happened, the Philadelphia bank turned out to be solvent and prompt, cannot affect the situation of the parties when Bush met Porter. The future was not then known. It was known that it was a risk; that it was a risk which defendant would not take; and that it was a risk which Bush at the suggestion of defendant threw upon the bank which trusted him.

The position of defendant's vice-president and counsel is this: "Jones has an account in a bank. Smith owes the bank $7,000. Smith brings the bank a check for $7,000 drawn on another city. The bank says to him: 'We will not take that check. It is quite likely never to be paid, and very probably not going to be paid for so long that considerable interest will have run against it, and we cannot meanwhile make it the basis of profitable transactions. The check is not worth $7,000 and would only be accepted as cash at a big discount.' Smith then says: 'What can I do? I have not got anything to pay my debt with except this check.' The bank then said: 'Well, while we won't take it, because it is not worth $7,000, we will thrust it down the throat of Jones, and make him take it at that amount. You deposit it in Jones' account and sign Jones' name to a check for $7,000; and as he has

more than $7,000 already in his account, we will cancel your debt.' The bank then does cancel the debt—that is, on its books, keeping the evidence of debt and the collateral, however, in its possession, just the same as before—but does not credit the check deposited to Jones. What can be fairer to the innocent, ignorant and confiding Jones than this transaction ? "

Upon the fairness of the transaction we comment no further. A word more may be said, however, about the difference between a credit as cash and a credit "for collection." A deposit for cash transfers the title to the check, so that the bank receiving it becomes a creditor of the depositor, while a deposit for collection does not pass title to the check, the bank holding it during process of collection as the depositor's agent.[1] When checks are received on deposit as cash, an absolute right to draw against them is given.[2] When a check is deposited as cash, its amount swells the account of the depositor. The depositor can sue the bank for damages if it dishonors drafts upon it for an amount not greater than that of the account thus swelled.[3] No such result follows when the deposit is not received as cash; when it does not appear in the general deposit account of the depositor at all; when it is merely noted in some other account as a piece of paper received "for collection." Nobody ever claimed that the depositor could draw against it under these cir-

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[1]Metropolitan Bank vs. Loyd, 90 N. Y., 530; National Butchers and Drovers' Bank vs. Hubbell, 117 N. Y., 384, 393.

[2]Manufacturers' Bank vs. Continental Bank, 148 Mass., 553; Metropolitan Bank vs. Loyd, *supra*, at page 535.

[3]Citizens' Bank vs. Importers' & Traders' Bank, 119 N. Y., 195; Bank of the Republic vs. Millard, 10 Wall., 152, 156; St. Louis Railway Co. vs. Johnston, 133 U. S., 566, 574.

cumstances, and that if his draft was dishonored he could sue the bank for damages.

Hence, the Elmira Bank, had its account previous to these deposits stood at zero, could not, either legally or by the customs of banking, have drawn more than $8,000 on May 5, 1893. Under what authority could the defendant have given Bush the right to draw $7,-012.50 more in the name of his own bank than his own bank would have been permitted to draw ?

But really the Elmira Bank had already more than $7,012.50 to its credit with defendant ; and *it was $7,-012.50 out of this fund, and not out of any moneys deposited by Bush, which Bush was so kindly permitted to draw out.*

(e) Hence, the transaction was not in due course of business, but irregular, fraudulent and criminal.

As a whole, it was unprecedented as well as unbusinesslike. So far as it involved a proposition by Porter and agreement by Bush that the Elmira Bank should be subjected without its knowledge to the risk of collecting from Philadelphia a part of what it was then losing, it was in gross bad faith. So far as it deprived the Elmira Bank of the overplus beyond the amount of the deposits, and of interest on one of the deposits, it was a fraud. So far as it involved the certification of a check without first entering it upon the books of the Elmira Bank, so as to cut off further drafts on Bush's account until it was made up for, it was a crime.[1]

(f) The transaction not being in due course of busi-

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[1] See, *supra*, page 23.

ness, Porter was not excused from inquiry either as to the $7,000 draft or as to the $8,000 currency.

Neither the Goshen Bank case nor any other case has ever held that either negotiable paper or currency may be retained by the recipient as against the true owner except when received in due course of business. That is a limitation, sometimes expressed, sometimes implied, upon every statement of the rules which legalize the transfer of A's money to B's pocket without A's knowledge or consent.[1]

(g) And finally, the defendant is estopped from basing any contention upon the fact (if it be a fact), that the $7,000 Quaker City draft was payable to Bush individually when first tendered by him. It is estopped from denying what it represented to the Quaker City Bank and to the Elmira Bank itself to be the fact, that it was payable to Bush as cashier, and, therefore, the property of the Elmira Bank.

By endorsing the draft in this form and presenting it for collection to the Quaker City Bank, defendant represented it to be correct in every respect. The draft was so large a one that it was likely to receive close scrutiny by the bank upon which it was drawn. A draft of $5,000 and upwards is called a "large draft," and submitted personally to the higher officers, even by the defendant bank with its immense business and its corps of 100 men.[2]

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[1] See Goodman vs. Simonds, 20 How., 343, 365; Stephens vs. Board of Education, 79 N. Y., 188, as quoted in Holly vs. Domestic & Foreign Missionary Soc., 180 U. S., 284, 293, and other cases cited in s. c., 92 Fed. Rep., 745; Thompson vs. Sioux Falls Bank, 150 U. S., 231, 239.

[2] Record, pp. 27, 31.

It would have been most proper for the Quaker City Bank, as the Philadelphia depositary of the Elmira Bank, to look carefully at large drafts purporting to be drawn upon it by its depositor, in order to ascertain whether they were drawn by duly authorized officers. Had this draft not been altered, it is very probable that it would have been made the subject of inquiry by the Quaker City officers—an inquiry which would have brought the whole unlawful transaction to the attention of the Elmira directors while the matter was still remediable without loss to anybody. They could at once have disavowed the draft, or forced Bush to make it good; while defendant still held Bush's note and collateral, and was in no worse position than before.

I have never up to this time been able to obtain the slightest judicial attention to this feature of the case, and yet I respectfully submit that it is conclusive.

IV.

There was no prior course of business sustaining Bush in drawing a cashier's check for his individual benefit.

Sustaining my first and second points, but overruling my third point, the learned judges of the Circuit Court of Appeals have regarded the existence or non-existence of a prior course of business, by which the cashier was wont to draw bank drafts to his own order or for his individual purposes, as the turning point of the case.

They have held that although no estoppel was claimed by defendant, and although there was no actual

authority, nevertheless by some reasoning—and upon the reasoning they are not agreed—if a cashier on a few prior occasions has drawn checks to his own order, no matter how small, and if they have been returned to the bank without being discovered and objected to by the directors, the bank and its creditors are thereafter debarred from objecting to any unauthorized check of the same sort, no matter how large.

This question turns upon elementary principles of the law of agency.

I respectfully submit that the evidence adduced in this case in support of the claim of "course of business" should have been absolutely excluded from the consideration of the jury for the following reasons

(a) That no one is bound by the acts of his agent, except upon the theory either of actual authority (express or implied, prior or by ratification) or of estoppel, and in particular that actual knowledge by the principal must be shown to establish actual authority, while negligence of the principal is not alone enough to establish agency by estoppel.

(b) That there is no actual authority here shown.

(c) That there is no estoppel here shown.

(d) That, even if the Elmira Bank directors were shown to be negligent in not discovering and reproving Bush's prior acts, that would not entitle defendant to base any claim upon them.

(e) That the directors are not shown to have been negligent.

(f) That, if the directors had known of the prior acts, and authorized or ratified them, their authority or ratification would not have bound the bank, still less its creditors.

(g) That there are not sufficient prior instances shown to take the case to the jury.

These propositions I will now take up separately:

(a) Judge SHIPMAN, upon the first hearing at the Circuit Court of Appeals, sustained the evidence of "course of business" upon the theory of "implied authority, which was to be inferred from the alleged acquiescence of the Elmira Bank in his prior assumption of authority."[1] He conceded at the second trial, upon the new evidence then elicited, that there was no express authority and no evidence of actual knowledge.[2] He had conceded in the appellate tribunal that there was no estoppel in favor of the defendant,[3] and no evidence upon the second trial affected this feature of the case. The two judges who sat at the second hearing in the Circuit Court of Appeals affirmed upon the former opinion, but one of them has since abandoned the theory of "any implied authority," and taken up that of a *quasi*-estoppel.[4]

I respectfully submit that there is neither sound principle nor any precedent binding upon this Court or of sufficient weight to control its decision, holding,

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[1] 104 Fed. Rep., at p. 216.

[2] Record, pp. 110, 111.

[3] 104 Fed. Rep., at p. 219.

[4] LACOMBE, J., in Campbell vs. Manufacturer's Bank, submitted herewith, at pp. 4–6.

in the case of acts neither actually nor apparently for the benefit of the principal, that his authorization can be inferred when those acts are unknown to him, or that his negligence binds him when the elements necessary to constitute an estoppel are wanting.

Defendant relies on cases of agency by estoppel, and on cases where a general agency with uncertain limits exists, and where acquiescence of the principal in notorious acts of the agent has been held to extend those limits beyond where, in the absence of such acquiescence, the Court would have placed them. Most such cases, however, are based upon acquiescence in acts which either actually or apparently are for the principal's benefit. Few, and none, I submit, with any support in reason or precedent, have so held when there was no estoppel and when the acts were beyond the natural limits of any general authority, and neither actually or apparently for anybody's benefit but the agent's.

The latest American text writer, Prof. Huffcut of the Cornell University Law School, divides agencies into those by agreement, by ratification, by estoppel, and by necessity.[1] As to the agency by estoppel, he points out that the five elements of estoppel must all exist in the case, including the element that the third party "must actually be induced to act, relying on the representation"; [2] and says that "the doctrine is the general doctrine of estoppel." [3]

In discussing ostensible authority, Mr. Huffcut says (§ 103): "In order to work an estoppel against the

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[1] Huffcut on Agency, § 9.
[2] *Id.*, § 53, citing Bigelow on Estoppel (5th Ed.), p. 570.
[3] *Id.*, § 106.

principal based upon the holding out of an agent as possessed of authority, it is necessary that the third person should have relied in good faith and prudently upon the appearance of authority thus created."

The latest English text writer states the principle as follows: "Where a person by words or conduct represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person *with respect to any one dealing with him as an agent on the faith of any such representation*, to the same effect as if he had the authority that he was represented to have." [1]

Mr. Ewart, in his recent interesting work on the law of estoppel, puts as the text of a chapter[2] the following statement of Lord Justice JAMES in *ex parte* Adamson, L. R., 8 Ch. Div., 807, 817-8: "Nobody ought to be estopped from averring the truth or asserting a just demand unless by his acts or words or neglect his now averring the truth or asserting the demand would work some wrong to some other person who has been induced to do something, or to abstain from doing something, by reason of what he had said or done, or omitted to say or do." Mr. Ewart adds: "Change of position to misrepresentation bears somewhat the same relation as consideration to contract." In applying the rule to the case of principal and agent, he lays down the following propositions:[3] "1. A man cannot

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[1] Bowstead on Agency, Art. 85; see, also, Mechem on Agency, § 84.

[2] Ewart on Estoppel, p. 131, citing also more recent authorities; see also pp. 140-1, discussing Heane vs. Rogers, 9 B. & C., 577, 586, and pp. 182-3, quoting 2 Pomeroy's Equity Jurisprudence, § 803.

[3] *Id.*, p. 473.

be bound by the act of another unless he authorized it.[1] 2. Nevertheless, if he personally represents that he has authorized it and on the faith of that representation some third party has changed his position, he ought to be estopped from denying the existence of authority. In such case the act was, and remains, unauthorized. 3. Assisted misrepresentation will also estop: If the ostensible agent is the one who makes the representation of authority, and the supposed principal has merely assisted that representation—done that which has made it credible—he will be as much estopped as if he had himself made the representation." Quoting Lord CRANWORTH[2] to the effect that the third party "must show that the agency did exist, and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it," Mr. Ewart adds:[3] "In other words, you must prove agency and extent of agency, or else estoppel—agency or estoppel; fact or preclusion to deny fact."

Mr. Daniel gives the same rule in the special case of negotiable paper issued by an agent: "But when it is sought to bind the principal on the ground of prior similar transactions or recognition of such acts by the principal, *it must be shown that the bill or note was taken upon the faith of them.*"[4] The other recent writers on commercial paper are to the same effect.[5]

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[1] "Ratification as a ground of liability is not within the scope of the chapter." *Id.*, p. 473, note.

[2] In Pole vs. Leask, 33 L. J., Ch. 155, 162 (H. L.).

[3] Ewart on Estoppel, p. 487.

[4] 1 Daniel on Negotiable Instruments, § 297.

[5] Tiedeman on Commercial Paper, § 79; 1 Randolph on Commercial Paper, § 363. See also the very clear statement of the difference between actual and ostensible agencies in the California Civil Code, §§ 2298-2300, 2315-7, 2334.

This rule is very clearly set forth by Mr. Chitty as follows: "An authority may also be implied and inferred from prior conduct of the principal, for a special authority is not necessary to constitute a power to draw, indorse or accept by procuration, but the law may infer an authority from the general nature of certain acts permitted to be done, * * * and it has been held that if a person usually subscribes an instrument with the name of another, proof of his having done so in many instances is sufficient to charge him whose name is subscribed, without producing any power of attorney. * * * *But it must appear that the bill or note is taken upon the faith of prior similar transactions;* and therefore the holder of a bill purporting to be, but not in fact accepted by the person to whom it is addressed, cannot recover against the apparent acceptor by proving a fact *subsequently* discovered, that on a former occasion the defendant had given a general authority to the person who accepted in his name to accept bills for him; *to make such authority available, the holder must show either that the authority remained unrevoked at the time of the acceptance, or that he took the bill on the faith of such authority.*" [1]

The leading case is Cash *v.* Taylor, 8 L. J., K. B., 262, decided in 1830. Defendant was sued upon an acceptance signed in his name by his brother-in-law. It was shown that similar acceptances had been paid by defendant to third parties, but plaintiff did not know this when he took the paper. Lord TENTERDEN left it to the jury simply to decide whether the

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[1] Chitty on Bills, pp. 31–2.

brother-in-law was authorized to accept the bill in question, and the Court *in banc* sustained him.

The principle is fully recognized in New York. In the famous Schuyler case[1] Judge DAVIS said: "The doctrine of implied agency, when it arises out of negligence, I think has its true basis in the principle of estoppel *in pais*." The leading case there is People vs. Bank of North America, 75 N. Y., 547, 561, involving the question whether the State was chargeable at suit of defendant with certain drafts endorsed by one Phelps, the cashier in the office of the State Treasurer. It was proved by defendant that Phelps had made similar endorsements upon *fifteen* other drafts besides the one in question. Judge EARL, among other grounds of decision, said that assuming that there would have been an estoppel in favor of the banks which had taken those fifteen drafts, "the facts constituting such estoppel were unknown to the defendant, and in no way influenced its action;" adding, "It is said also that the facts which existed in and about the treasurer's office and the relations and dealings between Phelps and the treasurer, were such as to give Phelps *apparent* authority to make these endorsements, and hence that the State is bound by them. *Apparent* authority operates *only by way of* estoppel, and can take the place of real authority only when some person has acted upon the appearances"[2].

In Fifth National Bank *v.* Navassa Phosphate Co., 119 N. Y., 256, relied upon by defendant below, it was

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[1] N. Y. & N. H. R. R. Co. vs. Schuyler, 34 N. Y., at p. 53.

[2] To the same effect see remarks of ANDREWS, J., in Walsh vs. Hartford Ins. Co., 73 N. Y., 10, quoted by RUGER, C. J., in Bickford vs. Menier, 107 N. Y., 490, 494; Blass vs. Terry, 156 N. Y., 129, 129, 130.

admitted that, in the absence of an estoppel, knowledge on the part of the directors must be proved in order to establish a course of business. This the Court said was "the real difficulty," but as there was some evidence of knowledge it was held a case for the jury; for, if the principal knew and acquiesced, thus affording an actual implied authority, it was of course immaterial whether the other party knew of it or not. Authority from knowledge and acquiescence, like other kinds of actual authority, needs no estoppel to rest upon. Defendant also put some reliance in this connection upon remarks of Judge VANN in Hanover Bank *v.* American Dock and Trust Co., 148 N. Y., 612. That case, however, as shown by the final paragraphs of the opinion, turned upon the question of actual authority—whether the "jury would have been warranted in finding" that the prior instances "had come to the knowledge of the directors;" whether they "might have been satisfied that the directors knew that Stone was occasionally creating obligations," &c. (pp. 623–4).

The rule for which I contend was clearly recognized by the Circuit Court of Appeals in Lamson vs. Beard, 94 Fed. Rep., 30.[1] In Mining Co. vs. Anglo-California Bank, 104 U. S., 192, relied upon by defendant below, the case turned on knowledge, not which the directors *ought* to have had, and which they "must be *presumed* to have had," a presumption which, "if not under the special circumstances of this case conclusive [that is, it would seem, when there is an estoppel] might

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[1]See findings at 94 Fed. Rep., 33, and opinion of WOODS, J., at p. 41.

have been overthrown by affirmative proof of want of authority, express or implied."

The authorities elsewhere fully support the contention that there is no such thing as a binding ostensible authority in the absence of actual authority, express or implied—that is, in the absence of any knowledge on the part of the principal—except in favor of a party who is able to assert an estoppel[1]. Thus in Murray *v.* Nelson Lumber Co., 143 Mass., 250, the contract in suit was made by the president of the company, and was known to one other director. The question for the jury was whether there had been ratification of this contract by acquiescence. The trial judge charged that the jury might assume the directors "to know what it is their duty to know, what they are able to know." This was held to be error. MORTON, C. J., said: "The burden is upon the party who relies upon a ratification to prove that the principal, having such knowledge, acquiesced in and adopted the acts of the agent. It is not enough for him to show that the principal might have known the facts by the use of diligence. * * * In the case at bar, therefore, it was incumbent upon the plaintiff to show that the directors, or at least a majority of them, knew of the contract and its terms. * * * But the instructions given by the court gave to the jury a different test. Under them, the jury would naturally understand that it was not necessary to find that the directors knew of the contract, but

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[1]See for instance St. John vs. Redmond, 9 Porter, 428, 432-3, and Rawson vs. Curtis, 19 Ill., 456, 474-5, cited in 1 Randolph Comm. Paper, §363; Lord CRANWORTH in Bank of Ireland vs. Evan's Charities, 5 H. L. C., at page 413.

that it would be sufficient if, in their judgment, the directors, by the use of diligence, might have known it."

The action of the Court below was avowedly based upon language used by Mr. Justice HARLAN in Martin vs. Webb, 110 U. S., 7 ; and in his recent statement of the rule deplored by him, but regarded as based upon authority, Judge LACOMBE used language taken from that case[1]. But "read in the light of the facts of the case," as opinions of this Court must be[2], the language does not bear the meaning attributed to it. The learned Justice himself gives this caution : "We have stated with some fullness the circumstances disclosed by the record, *so that the general expressions in this opinion may be interpreted by the facts of this case.*" Now the Martin case did not concern acts of the cashier which were illegal or against public policy or for his own benefit. It concerned acts which ordinarily indeed are not performed by the incumbent of that office, but which were, so far as appears, performed in good faith and in the interests and for the benefit of the bank. They related to certain loans secured by deeds of trust. The majority of the directors were absentees. They knew that the cashier was taking entire charge of the matters connected with the deeds of trust, and never attempted to look into his transactions. The cashier "understood, and from the conduct of the directors had reason to understand, that he was in-

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[1]Campbell vs. Natl. Broadway Bank, herewith submitted, at page 5.

[2]Cohens vs. Virginia, 6 Wheat., 264, 399 ; Barney vs. Rickard, 157 U. S., 352, 364 ; Pollock vs. Farmers' Loan and Trust Co., *Id.*, 429, 574.

vested with full authority to manage the operations of the bank according to his best judgment and without disturbing the directors." During seven years he satisfied, upon the authority so derived, more than 150 such deeds of trust. After this the bank undertook, upon the claim that he was unauthorized, to repudiate a new note taken by him and secured by a new deed of trust, and to revive an original debt and the trust deed given therefor, which had been by him cancelled—and this without returning the money which had been received by the transaction. As said by the Court, to permit this "would be a mockery of justice." There was a complete estoppel upon the bank, and overwhelming proof of actual authority through general knowledge that the cashier was continually engaged in transactions of this nature, and acquiescence therein. The discussion of the Court was not directed to a situation where there is neither authority or estoppel. The remark concerning what the directors "ought to have known as to the general course of business" relates to dealings with persons who have actually dealt in reliance upon that course of business: "That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

An attempt was made upon this trial to show that Bush ran the Elmira Bank as fully as the cashier in the Martin case ran his bank. The attempt was unsuccessful. Bush said that the president, one director named and himself "had more to do with the running

of this bank than any of the others," and that his own management was "so generally in accord with the management of the bank that no one interfered," but said positively "It was not a fact that all of those details were practically entrusted to my sole judgment. Our board of directors had an examining committee to pass on all our loans. We had an auditing committee who looked over our books, and occasionally lines of loans would be cut down."[1] The regular appointment and attendance of the committee has already been set forth.

(b) That there is no express authority shown for any of the prior drafts used by Bush for his own benefit is conceded; and that there is no implied authority shown results from the conceded fact that no actual knowledge is shown.[2] Of course, ratification, like original authority, implies knowledge.[3] "No doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts."[4]

Defendant in order to establish implied authority had the burden of proving that the facts were known to the directors; but in order to exclude any inference from the fact that some of the instances could have been discovered by the directors if they had examined

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[1] Record, pp. 51-2.

[2] Record, pp. 110, 111.

[3] Mechem on Agency, § 129 and cases cited; Titus vs. Cairo Co., 46 N. J. Law, 393, 420.

[4] Owings vs. Hull, 9 Pet., 607, 629; Bennecke vs. Insurance Co., 105 U. S., 355, 360.

all of the returned checks, plaintiff proved affirmatively upon the second trial, that it was not the practice of the directors to do so, and that in fact they had not discovered Bush's signatures, calling for that purpose one of the supervising and examining committee who had attended at all the examinations made during the period in question.[1] It was proper for the directors to leave the examination to a committee. The witness' testimony was unquestioned and in support of the legal presumption, and there was no necessity of cumulating evidence by taking the depositions of the other gentlemen present at the committee meetings, or of the directors who had no specific duty in the premises.

(c) That there is no estoppel is conceded. Porter, who acted on behalf of the defendant, does not claim to have had in mind any prior instance of Bush's signature, nor that any prior instance was known to him. In this respect the record is the same as upon the first trial.[2]

(d) That negligence of the directors is no defense to a party not able to claim an estoppel in his favor has already been shown.

Judge LACOMBE, is his latest discussion of the subject,[3] puts such a defense upon the theory that if the directors have been negligent and failed to stop the cashier from signing for his own benefit, they induce persons taking the checks to be less careful about scrutinizing his authority; but that theory is only

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[1] Record, pp. 44, 45-6, 88-5.

[2] See Gale vs. Chase Nat. Bank, 104 Fed. Rep., at p. 219.

[3] Campbell vs. Natl. Broadway Bank, herewith submitted.

applicable when the negligence of the takers is induced by the negligence of the directors—when, in other words, there is an estoppel.

Defendant is basing itself upon the very slight, if any, negligence of the Elmira directors in not carefully scrutinizing every signature on the smallest check and comparing it with the name of the payee. Defendant's vice-president was far more negligent in permitting such a transaction without the inquiry which, with telephone connection, would have been so easy. His negligence in this respect is an answer to his bank's position in two ways. It is contributory negligence,[1] and it is the proximate cause of the loss, while the plaintiff's negligence, if any, is remote.[2]

(e) There is no evidence justifying the submission to the jury of the question whether the directors were negligent in not examining the signatures.

To justify sending a question to a jury there must be some evidence strong enough to sustain a verdict in favor of the party having the affirmation.

If the directors were negligent in not examining every five-dollar draft signed by Bush in order to see whether it was properly used, they were of course pecuniarly responsible for the loss caused by consequent failure of the Receiver to collect the demand here in suit. Was their duty not performed sufficiently well when they ascertained that all drafts issued by the bank had been paid for? If their failure to find that the

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[1] New York Iron Mine vs. Negaunee Bank, 39 Mich., 644, 656, per COOLEY, J.

[2] Scholfield vs. Earl of Londesborough [1895], 1 Q. B., 536, and cases cited (affirmed on other grounds 1896, App. Cas., 514).

cashier, on an average of four times a year, has issued a small draft to his own order, for his own purposes, and paid for it, subjects the bank to loss in case of his subsequent embezzlement of the largest amount, how many bank directors are unwittingly running up against themselves or their executors gigantic obligations? How many banks in the United States have their vouchers audited with such minuteness? How many would lose valuable directors if such an expenditure of time and labor were known to be a requirement of the office?

Even the cashier of the defendant bank is not expected to examine all checks under $5,000 that pass through it.[1] The Elmira Bank was smaller, of course; but if its standard of a large draft, requiring personal attention, had been as low even as $500, only one precedent would have come to the attention of its directors.

(f) But the directors of the Elmira Bank were themselves without power to give Bush general authority to issue bank drafts in his own favor.[2]

This is a question which is up to this time unsettled in the Federal Courts. These Courts have sometimes for purposes of discussion considered whether, in given cases, bank directors have estopped their bank from denying the existence of a general authority; but they have always until now ended by concluding that, in the particular cases under consideration, there was no estoppel, and by giving judgment in favor of the bank, so that the fundamental question did not

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[1] Record, p. 31.

[2] This subheading is substantially a copy of the brief submitted to this court by the undersigned in Phelps vs. Beard, at October Term, 1900.

require discussion. So far as the Federal cases bear upon this question, the nearest is Anderson *vs.* Kissam, 35 Fed. Rep., 699, 701, 703. It was there held that a general usage of all the banks of New York City, recognizing a general authority in bank cashiers to sign bank paper for their individual purposes, was contrary to public policy and illegal. If this general usage of all banks is illegal, certainly a corresponding special usage of a single bank is equally illegal; for if the directorate of a single bank may establish a custom giving their own cashier any particular authority, all the directorates of all the banks may join in establishing a general custom giving that authority to all cashiers. The Kissam case was reversed on another point (145 U. S., 435) and then compromised.

Such cases as Martin *vs.* Webb, 110 U. S. 7, above discussed at length, have obviously no bearing upon the present question. They hold that the directors, by sufficiently long acquiescence in a course of business adopted by a cashier, may impliedly confer upon him an authority not ordinarily pertaining to his position. The authority thus conferred, however, is perfectly lawful and proper, and might unquestionably have been conferred beforehand by a resolution duly entered upon the minutes. These cases do not touch the question whether directors may grant an authority so broad, so unnecessary, and so dangerous to the safety of their corporation, as to contravene the policy of the law.

There is little discussion of the question in the State Courts. The New York decisions have assumed without discussion that the principle of such cases as Martin *vs.* Webb is applicable, and have

given the doctrine of acquiescence in an illegal course of business a most extreme application.[1] Missouri, on the other hand, lays down the rule that "there can not be a course of dealing in reference to illegal acts," and that when a corporate agent assumes to represent his company where his own interests are adverse, there can be no ratification without knowledge "of the facts of the particular transaction."[2]

I submit two propositions:

First, that the question to be decided is, in effect, whether the Board of Directors, by resolution operating *in futuro*, can give to the president or cashier a *general* power to issue bank paper for his own benefit.

Subsequent ratification, whether by acquiescence in a "course of business" or otherwise, can be no broader than prior authority by express grant *in futuro*. The maximum is *omnis ratihabitio retrotrahitur, et priori mandato equiparatur*.[3] "A ratification is, in its effect upon the acts of an agent, equivalent to the possession by him of a previous authority."[4] "A ratification can have no greater force than a previous authority."[5] "If the ratifier could not have given legal authority for the

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[1] Hanover Bank *vs.* American Dock and Trust Co., 148 N. Y. at p. 623, per VANN, J., but as above remarked, the last sentences of the opinion indicate doubt, unless knowledge of the directors is proved.

[2] Mercantile Ins. Co. *vs.* Hope Ins. Co., 8 Mo. App., 408, 411; Lee *vs.* Smith, 84 Mo., 304: see also Iowa Bank *vs.* Black, 91 Iowa, 490, 496, and Judge GARRISON'S opinion in Campbell *vs.* Manufacturers' Bank, herewith submitted at p. 15.

[3] STORY, J., in Fleckner *vs.* United States Bank, 8 Wheat., 338, 363.

[4] Marsh *vs.* Fulton County, 10 Wall., 676, 684; see also Bloomfield *vs.* Charter Oak Bank, 121 U. S., 121, 135–6; Park Hotel Co. *vs.* Fourth Natl. Bank, 86 Fed. Rep. 742, 747.

[5] Daviess County *vs.* Dickinson, 117 U. S., 657, 665.

act, the adoption of course could not render it any more valid than previous command could have done." [1]

It may be added although not necessary to the present controversy that as bank directors have no power to ratify a course of business, the bank cannot be estopped by their assent or inaction. This is because persons dealing with the bank are bound to know the limitations of the directors' power—that is, limitations not imposed by peculiar provisions of the charter and by-laws, but common to all similar directorates, and imposed by law. "The authority implied from a public holding out, tacit acquiescence, or usage and ordinary course of dealing, can never go beyond the power which the bank could legally confer on the officer under the circumstances of which C [the third party] has notice. * * * They only suffice to confer upon the officer just as much authority in the premises as he could have derived from an empowering resolution of the board of directors or of the corporate body." [2]

"The directors of the company then in office were its agents with limited powers, the extent of which the defendant was bound to know." [3]

It is, of course, unnecessary to discuss in a Receiver's action the subject of estoppel by assent of the *stockholders*—a subject foreign to the present discussion.

Second, that a resolution giving a bank officer general power thereafter to issue bank paper for his own

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[1] 1 Morse on Banks and Banking, 3d Ed., p. 212.

[2] 1 Morse on Banks and Banking, 3d Ed., p. 201.

[3] Mr. Justice STRONG in Bedford R. R. Co. v. Bowser, 48 Pa. St., 29, 37; 1 Morse, pp. 260-1.

benefit would be contrary to the policy of the law, and void.

Corporate directors have not unlimited powers. They are in the position of trustees or managing partners,[1] "agents with limited powers."[2]

Thus the directors cannot give the cashier general power to permit overdrafts, even when there is no statutory prohibition of overdrafts, for their powers "are not unlimited, but must receive a rational exposition"[3] "For directors, though they are the government of the corporation, are yet, no less than any subordinate officers, its agents, with a definite scope to their agency, and can only act legally within its scope. If the act is such that it is the duty of the party dealing with them to know that it falls without the ordinary limits of directorial power, he will be affected by its invalidity"[4].

They may make very extensive delegations of power to the officers of the corporation, but they may not make delegations of power which cannot benefit the corporation but only endanger its prosperity, and which are contrary to the policy of the law.

It is against the policy of the law for an officer or agent to make a contract on behalf of the corporation when he is individually interested upon the other side; and it is because it is against public policy that such a contract is voidable[5]. The individual may have

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[1] Koehler *vs.* Black River Co., 2 Black5, 71, 720–1.

[2] Bedford R. R. Co. *vs.* Bowser, 48 Pa. St., 29, 37, STRONG, J.; Hall *vs.* Auburn Turnpike Co., 27 Cal., 255, SAWYER, J.; Jones *vs.* Morrison, 31 Minn., 140; and authorities cited, *infra*.

[3] Minor vs. Merchant's Bank, 1 Pet., 46, 71.

[4] 1 Morse on Banks and Banking, 3d Ed., pp. 260–1.

[5] Warddell vs. Union Pacific R. R. Co., 4 Dill, 330, 335, MILLER, J.; s. c., 103 U. S., 651, 657; West vs. Camden, 135 U. S., 507, 521.

acted honestly, and thought he was acting for the best interests of his company; but the contract will not stand if the company makes timely complaint.

The issuance of a bank draft by a bank officer for his own benefit, is but an instance of this rule. Such a draft, when to his own order or when offered to one knowing of his interest, is a "danger signal," discredited upon its face, because it is against the policy of the law for the officer to act in a double capacity, for his company and for himself[1].

Since the law on grounds of public policy prohibits the acts aforesaid, it necessarily follows that the Board of Directors cannot pass a resolution that thereafter they should be permitted. Directors cannot lawfully enact that the president or cashier may thenceforth contravene public policy. Such a vote would fall "without the ordinary limits of directorial authority." It cannot benefit a bank to give the cashier discretionary power thereafter to issue bank paper for his own benefit. The profit involved in keeping his deposit account could equally well be earned if the discretionary power to issue that particular paper were confided to the president, or some other officer of the bank. Confiding the power to the cashier would, on the other hand, place him in constant temptation, and lead him sometimes into embezzlement.

It may be urged, however, that a draft signed by the cashier to his own order, or for his own benefit, if duly paid for, may be ratified by the board of directors, expressly or by acquiescence. That is true, and for this

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[1] Park Hotel Co. vs. Fourth Natl. Bank, 86 Fed. Rep. at p. 744, and cases cited by SANBORN, J., Lamson vs. Beard, 94 Fed. Rep. at pp. 43-4.

reason: It is not the mere *signature* of the cashier that is objectionable. That is but a ministerial act. It is his exercise of discretionary power in his own behalf which the law makes illegal. If the directors vote that he shall be paid a certain amount of money or given a certain loan of credit, or request him to act in his own name in furtherance of some scheme of the bank, they may instruct him to perform the ministerial act of signing the necessary paper;[1] and so if he issues the paper without authority, but his act was not detrimental to the bank, they may thereafter give a ratification which *priori mandato equiparatur*.

Hence a cashier's draft to his own individual order is not an absolute nullity but only a "danger signal," and may turn out to be upon special authority.

We do not argue that the directors cannot give the president or cashier a *special* authority to sign a particular draft to his own order, but that they cannot give him a *general* authority which will entitle third parties to rely upon his signature without inquiry into the special circumstances of the case.

What inference, then, may properly be drawn by a person aware of the issuance by a bank cashier of a series of bank drafts to pay his individual debts or meet his individual margins? The above argument shows that a general authority to draw bank drafts for these purposes cannot be inferred, because nobody had the power to give him such authority. The inference, therefore, must be either, first, that the directors did not know that he had

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[1] Tripp vs. Swanzey Paper Co., 18 Pick., 291.

been signing drafts for such purposes (which is altogether probable); or that, having been informed of it, they had given him a proper rebuke; or that they had previously authorized, or subsequently ratified, his action in each specific case known to them. None of these inferences would tend to establish a "course of business," justifying reliance upon a future draft of this kind without special inquiry. A draft specially authorized by a board of directors is not given in any ordinary course of business. It is not according to the ordinary course of business for directors to exercise their discretion upon the issuance of a draft. This, under ordinary circumstances, is the function of a cashier, or of whoever exercises the ordinary duties of a cashier; and consultation with the board of directors would be an unusual and extraordinary event.

It is submitted that the great dangers involved in the sustaining of a general authority, such as is here contended for, are too obvious to require extended comment. A sufficient example should be the recent New York case of Hanover Bank *v.* American Dock and Trust Co., *supra*. The defendant's president had signed in his official capacity a warehouse certificate for his own benefit on March 11, 1891. Other similar certificates given to other banks had been held to be nullities, because he was signing for his own benefit.[1] The transaction was sustained, however, and the defendant charged with the loss resulting from this

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[1] Bank of New York *v.* Same, 70 Hun, 152; S. C. on appeal, 143 N. Y., 559; see also Corn Exchange Bank *v.* Same, 149 N. Y., 174; S. C., 163 N. Y., 332.

fraudulent act, because ten years before, when holding a different office in the company, the same officer had issued two similar certificates, while five years before, also while holding a different office, he had signed three other similar certificates, making five in all, and because the company's secretary had stated that he was "the sole man to sign these receipts."

(g) The drafts submitted to the jury were not sufficient in number and amount to constitute a "course of business" sufficient to sustain a draft for $7,000.

The Circuit Court of Appeals first held that "nine drafts, five of them to the order of creditors, all amounting to $2,630," and covering a period of about seven months, were not enough, and ordered a new trial.[1] Judge SHIPMAN, who had delivered this opinion, on the second trial held that eight drafts, covering a period of about twenty-four months, and amounting to $594.24, "would have been entirely, in my opinion, inadequate."[2] The case was left to the jury, however, upon these eight drafts, together with four lost drafts, twelve in all, covering the same period, and amounting altogether to $2,076.61.

We have found no instance in the books where a custom of issuing or discounting paper for small amounts has been held sufficient to establish authority to issue or discount to amounts fifty, twenty or ten times—even twice—as large. Pecuniary amount is an element always to be taken into consideration. Thus, in a New York case,[3] the Court says that there is on

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[1] Gale vs. Chase Natl. Bank, 104 Fed. Rep., at p. 218,.

[2] Record, p. 112.

[3] Farmers' Bank vs. Noxon, 45 N. Y., 762, 765; and see Campbell vs. Manufacturers' Bank, herewith submitted; James Reynolds Co. vs. Merchants' Natl. Bank, 55 N. Y. App. Div., at pp. 3, 4.

notice of lack of authority from the discounting of a note by an agent, when he was in the habit of discounting notes "of an amount as large as the one in question."

The test, as stated in Martin *v.* Webb, and repeated by this Court in the case at bar, is that to show a settled course of business the prior acts relied upon must have been performed "during a series of years, or in numerous business transactions." In Martin *v.* Webb the prior deeds of trust relied upon by the Court extended over a period of seven years and were about 150 in number. It is respectfully submitted that twenty-four months is not a sufficient period of time to constitute a "series of years," and thus dispense with the necessity of proving numerous transactions, and that the admitted insufficiency of eight drafts of the total value of $594.24 is not remedied by finding, or inferring the existence of, four more drafts of the respective amounts of $100, $306.67, $306.67 and $769.03.

There must be a pecuniary limit somewhere to be found, a draft below which cannot reasonably and lawfully be used as a precedent for a draft of so large an amount as $7,000. If, during a series of years or in numerous business transactions, an agent should issue drafts to his own order for $6,999 each, they would doubtless be sufficient, so far as amount was concerned, to sustain a subsequent draft of $7,000. If, however, the prior drafts were but for $1 each, to infer from them a power to draw a draft for $7,000 would be absurd. A line must be drawn somewhere. A person to whom a $7,000 draft is tendered with the information that the agent by whom it was drawn has frequently drawn drafts of $1 each, which have been paid

by his principal, must still make further inquiry. It is quite probable that the principal may have given the agent authority to draw for small amounts without special permission in each case, as a matter of convenience. It is very probable that the principal may not have carefully examined the drafts for small amounts, and confined his close supervision to drafts of substantial importance.

It would not be prudent to take an agent's paper, signed in his principal's name for his own benefit, for $7,000 because such paper for $1 or $100 had been honored by the principal; and, as the latest writer says (Huffcut on Agency, § 103): "In any case where the third person may not *prudently* infer that the agent possesses the powers exercised, he is negligent, and it is his own negligence, and not the conduct of the principal, that is the proximate cause of his loss." The third person must act with "average prudence and good faith" *(Id.*, § 102*)*.

In some cases there may be difficulty in drawing the line, but it is submitted that there can be no difficulty in the case at bar.

Defendant urged at the Circuit Court of Appeals that, in addition to the drafts above referred to, a number which were excluded from the jury should be taken into consideration.

These drafts were excluded either because they did not show upon their face that Bush was individually interested in them or because they were in fact used for the benefit of the bank.

It is obvious that for convenience in the transaction of some business for the bank the cashier may draw a draft to his own order. There is nothing wrong

about this. It is not the mere naming himself as payee, but the acting in the bank's name for his individual benefit, that is beyond his authority. Hence, the drafts used for the bank's benefit, whether Bush was named as payee or not, are immaterial to this case.

If, however, the drafts were not drawn to his order, mere inspection would not show that they had been used for his benefit. The Auditing Committee could not learn this without hunting up each draft separately through the individual accounts of depositors, to find where a corresponding amount is charged, or comparing all the drafts with the checks given by depositors therefor. Either would be a gigantic task, and the latter would be impossible of complete performance, since the checks would often be returned to the depositors before the corresponding drafts came back from the New York and Philadelphia banks upon which they had been drawn. Hence these drafts to the order of outside parties, although proved upon the trial to have been obtained for Bush's benefit, were held immaterial. [1]

V.

Plaintiff was therefore entitled to recovery in full.

Upon the trial we tendered to defendant the $15,012.50 check. The tender was made *ex majori cautela*,[2] although believing it unnecessary. It seems

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[1] Gale vs. Chase Natl. Bank, 104 Fed. Rep., at pp. 218–9.

[2] On account of Maguire vs. Halsted, 18 N. Y. App. Div., 228, 230.

to have suggested a point, raised at the Circuit Court of Appeals, that there was a defect in plaintiff's case in not alleging and proving a tender before suit.

Defendant's argument was that a demand was necessary before suit; that a tender of the check was necessary to an effective demand; and that we had therefore failed to prove a necessary condition precedent to the action. To this objection there are two answers:

First. We offered on the trial what the Court considered to be sufficient proof of a demand.[1]

Second. In this case no demand and no tender were necessary at all. It is undoubtedly true that in an ordinary suit for the balance of a deposit account a demand is necessary. Until a demand is made the bank is guilty of no impropriety in retaining the money. This is even the case when the bank has not retained the money, but has paid it out innocently upon a forged check or a forged endorsement.

Demand, however, is altogether unnecessary when the bank has unlawfully claimed an adverse right to the deposit, or has otherwise put itself in the wrong.[2] "If the defendant by his words or conduct denied the right of the depositor, as, for instance, by placing the deposit to the credit of a third person, he thereby became presently liable to an action for the amount, without a formal demand."[3]

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[1] Record, p. 20.

[2] 8 Am. & Eng. Encycl. Law, 2d Ed., p. 839; Bank vs. Benoist, 10 Mo., 519; Miller vs. Western Bank, 172 Penn. St., 197; Howard vs. France, 48 N. Y., 593.

[3] Carroll v. Cone, 40 Barb., 220, 223; affd. by Ct. App., see 41 N. Y. 215, 216; see, also, Korneman vs. Brewing Co., 4 Misc. (N. Y.), 299, 301; Reynolds Elevator Co. vs. Merchants' Natl. Bank, 55 N. Y. App. Div., 1.

This is not in the nature of an ordinary suit for balance of deposit. The admitted balance has been paid, and this suit is to recover an amount to which defendant claims title. Demand was therefore unnecessary, because it was clear that it would be refused. The position taken by defendant was with full knowledge of all the facts of the case. In such circumstances the law does not require so nugatory an act as a demand. "It is a general rule that when the tender of performance of an act is necessary to the establishment of any right against another party, this tender or offer to perform is waived or becomes unnecessary, when it is reasonably certain that the offer will be refused—that payment or performance will not be accepted." [1]

It will be noticed that a tender of the check to defendant was altogether unnecessary for the defendant's protection. The check was not good as against the bank on which it was drawn, but could only have been available in any case as evidence in an action against Bush for its amount; but defendant held Bush's note for the amount, upon which he could have been sued; or, if the bank should prefer to sue him upon this paper, its production could have been obtained by subpœna, if not by a mere request.

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[1] Hills v. National Albany Exchange Bank, 105 U. S., 319, 321; S. P. U. S. v. Lee, 106 U. S., 196, 201-202; Martin vs. Home Bank, 160 N. Y., 190.

Conclusion.

Most of the specifications of error need no further argument. They raise in different ways the questions hereinabove discussed.

The main objection to evidence (Assignment VII.), and the motion to direct a verdict (Assignment XXVII.), present most of the questions in the case.

The Court's ruling in making the case turn upon the question whether the Elmira Bank's directors had been negligent in auditing vouchers is brought out by Assignments XXXIII., XXXIV., XXXV., LI., LII.

Its ruling that the smallest prior draft that may have been overlooked by the directors supports third parties in giving unlimited credit to a cashier's draft for his own benefit is brought out in Assignments XII., XIII., XIV., LIII.

Assignment XXXI., that it was error to put on the plaintiff the burden of proving bad faith, is supported by Thompson vs. Sioux Falls Bank, 150 U. S., 231, 239; also, see, 123 N. Y., 191, 201; 9 Wend., 170 and cas. cit.; 145 N. Y., 502. The learned Judge probably had in mind cases where negotiable paper comes in due course of business into the hands of a *bona fide* holder for value without notice, and there is no defect apparent on its face.

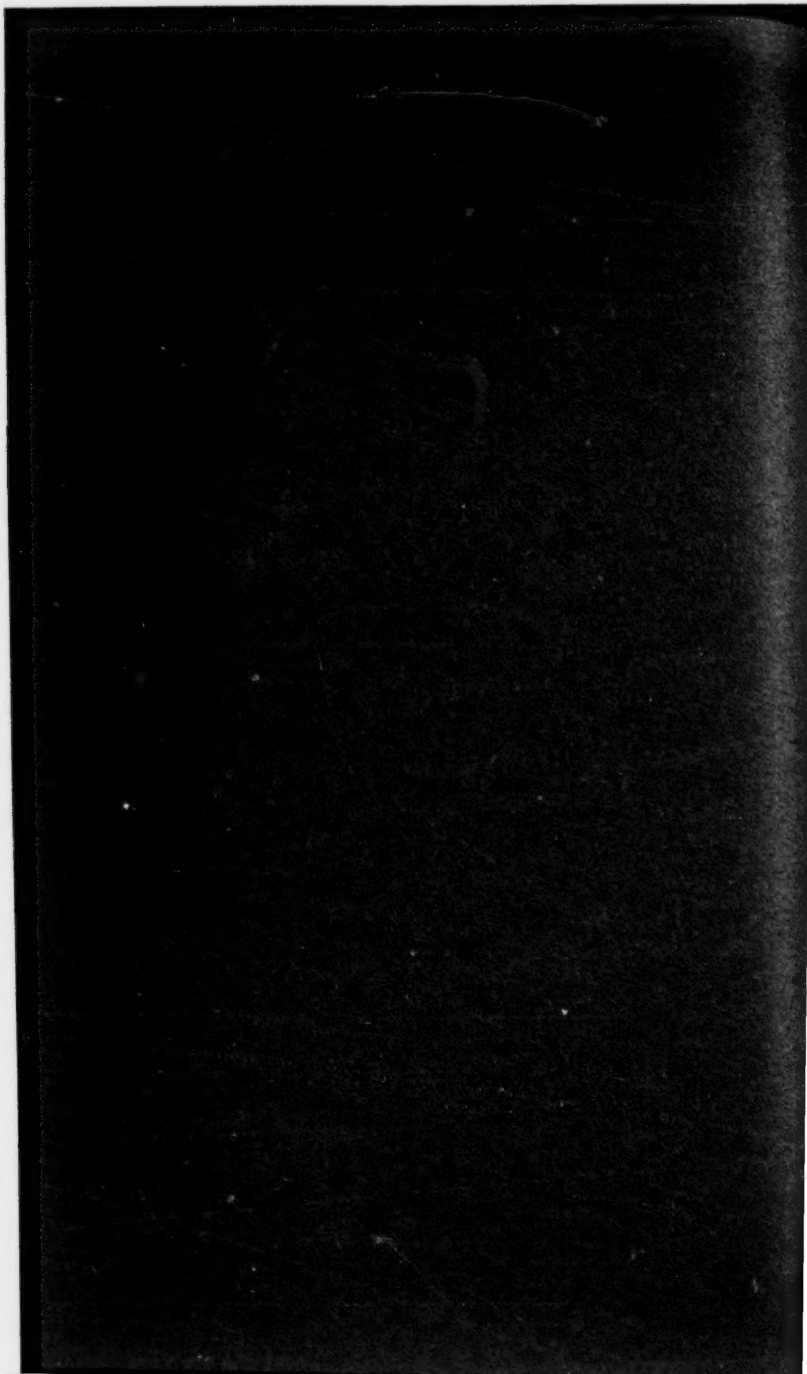
Assignment XLI., that it was error to refuse to charge that the defense fails if Porter's suspicions were aroused, is supported by Goodman vs. Simonds, 20 How., at p. 367 (top.); Murray vs. Lardner, 2 Wall., at pp. 120, 121; Jones vs. Gordon, L. R. 2 App. Cas., at pp. 628-9. The Court had charged that Porter must be affected with bad faith, of which plaintiff had the

burden of proof. He should at least when requested have given the jury the legal definition, and in considering this question the jury should have been apprised of the fact that Porter was conniving at a crime (Assignment XLIV. ; *supra*, p 23.).

The Court had very properly excluded certain drafts drawn by Bush as cashier to the order of third parties (see *supra*, pp. 69–70) ; others of the same kind had been admitted over plaintiff's exception, and it is submitted that plaintiff was entitled to a clear direction that they should be disregarded (Assignment XLVIII.).

For the reasons above stated it is respectfully submitted that the judgment should be reversed.

EDWARD B. WHITNEY,
Of Counsel for Plaintiff in Error.



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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

CHARLES F. GALE, as Receiver, &c., Plaintiff in Error, vs. CHASE NATIONAL BANK.	No. 105.

Recent Unreported Cases on "Course of Business."

In the litigations arising out of the embezzlements of Valentine, cashier of the Middlesex Bank of Perth Amboy, N. J., there have been very recent decisions which are of interest as bearing on the question whether, and if so under what circumstances, a prior "course of business," adopted by the cashier, and unknown to the directors and officers of the bank, can debar the bank from denying his authority to issue its drafts for his individual benefit.

The National Broadway Bank case was in October, 1902, before Judge LACOMBE, who had sat in the Court of Appeals at both hearings of the Gale case. It thus expresses his subsequently matured view of the subject, and his reasons for having joined in overruling our contention.

The Manufacturers' National Bank case was decided by the New Jersey Court of Errors and Appeals in March, 1902, some Judges dissenting without opinion.

I beg leave to submit these decisions, together with the opinion of Judge SWAYZE in the New Jersey Supreme Court in the case last referred to.

It should be added that the New York Courts in the same litigation have come to a conclusion which, so far as it is applicable, is adverse to the present contention of the plaintiff in error (Campbell vs. Upton, 66 App. Div., 434; affirmed without opinion in 171 N. Y., 644).

Respectfully submitted,

EDWARD B. WHITNEY,

Of Counsel for Plaintiff in Error.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CAMPBELL VS. NATIONAL BROADWAY BANK.

OCTOBER 23, 1902.

GEORGE W. WICKERSHAM and SHERRERD DEPUE for plaintiff.

HENRY B. TWOMBLY for defendant.

LACOMBE, J. (charging jury): This action, as you have perceived, is one brought by the Receiver of the Middlesex Bank, of Perth Amboy, to recover from the National Broadway Bank some money which was lost by reason of the transactions which took place between its cashier and the cashier of the National Broadway Bank. The money that it lost was the face of three certain drafts upon the National Park Bank, less certain small sums which it received in exchange therefor.

The transactions between the two cashiers were as follows: Valentine, the cashier of the Middlesex Bank, was indebted to the Broadway Bank on a note

past due and protested, I believe ; at any rate he was being pressed to pay it, and he came to the cashier of that bank and gave him his own, that is, his cashier's draft, on the funds of the Middlesex Bank in its New York depository, the National Broadway Bank, drawing that draft to the order of the Broadway Bank for the amount of his indebtedness to that bank, and turning it over to the cashier of the Broadway Bank in settlement of that indebtedness. That was the character of the first transaction. The third was precisely similar. The second of the three transactions was slightly different, in this: the draft was not given in payment of an existing indebtedness but was drawn to the order of the Broadway Bank and deposited there to the credit of Valentine's firm—Valentine & Company, and upon that deposit the Broadway Bank extended credit to that extent to the firm and the amount was subsequently checked out. So you will see there are three instances in which the Broadway Bank through its cashier received from the cashier of the Middlesex Bank his drafts on the funds of that bank; in two instances for the payment of his individual indebtedness to them, and in the third instance for the receipt of money to be used in his personal transactions, as was manifest from the circumstances that the deposit went to the credit of his firm.

These, as you have seen, were all what is known as cashier's drafts. Of course banks, like everybody else, although they themselves have cash and actual money, also have deposits in other moneyed institutions, and having deposits somebody or other has got to sign orders to get the money out of the depository when it is needed. The cashier is usually the one to draw such drafts, and the one to sign them ; but no cashier of any bank, by reason of the circumstances that he is the cashier, derives therefrom any authority to use the funds of the bank as his own, to pay his own debts with, or to draw off and invest in his own personal enterprises; and any one to whom a draft of that character is presented, that is,

a draft by the cashier of a bank upon the bank's funds, drawn to his own order, or to the order of his personal creditor, the creditor at the time having no transactions pending with the bank of which the other man is cashier, it is notification at once that there is something suspicious, something improper, something crooked to be anticipated. Everybody is naturally charged with knowledge upon receiving such a draft as that that there is risk to ensue from the payment. The risk originally, under the authorities—the natural risk to be anticipated—was that if it should turn out that by reason of improper conduct on the part of the cashier of the bank, the bank lost some of its funds through this transaction, then the creditor who had taken this cashier's draft would be liable to refund to the bank, or to its Receiver, on demand, the money obtained by means of such draft or check, because he was advised that it was an improper one and he took his risk. *It would have been a most wholesome thing if that principle had never been qualified at all* and if nobody was authorized under any circumstances to receive the drafts of the cashier of a bank on the funds of the bank in payment of the cashier's individual debt to the individual receiving them; but there have been occasionally very hard cases arising and hard cases have their operation in qualifying what may sometimes seem to be a very harsh rule of law, and it has seemed to the courts that as between two parties who are equally innocent in the matter, that is to say, on one side the stockholders and creditors of the bank, and on the other side the creditor who took the draft and gave up money for it, as one or the other must lose the money, it had better be the one whose officers were dishonest and whose directors were negligent, rather than the other one. That is quite a familiar principle, although in this particular instance the courts seem rather to have overlooked the circumstance *that in the one case the unfortunate stockholders and creditors had no means of knowing that their officers were dishonest or their directors negligent, until*

the trouble had occurred; whereas the creditor who received the consideration would always be advised by mere inspection of the face of the draft that something crooked was to be anticipated, that something was not right. However, pass all that. We have no concern with it, because the rule is laid down and laid down abundantly by the authorities that the risk taken is not the risk of having to make good the bank's loss by the transaction, but only the risk of being able to show that the particular paper, which ordinarily on its face might seem tainted challenged attention and suspicion, was still, by reason of the way in which the business of the particular bank had been done, a draft of the sort that was drawn, in the regular course of business and therefore he might be entitled to take it. In other words, when it appears in proof that during a series of years, and in numerous business transactions, the cashier has without objection and in his official capacity pursued a particular course of conduct,[1] it is to be presumed that that, so far as his bank is concerned, is a proper enough course of conduct. The conclusion resulting from that has been put by different authorities on different grounds. *It seems to me that the soundest ground to put it on is one which deals with the form of the draft, and not with any implied authority.*[2] *The Board of Directors themselves could not have given authority to the cashier to use the bank's funds as his own.* Suppose we had here a resolution of the Board of Directors to this effect: "Whenever the cashier is without money and is harassed by his creditors and wants to pay them, or whenever he needs money for his personal speculation, he is hereby authorized to take any money of the bank that he is able to lay his hands on, to use it to pay his debts with or to buy what he wants." That resolution, if

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[1] [From Martin v. Webb, 110 U. S. 7, as quoted in Gale v. Chase National Bank, 104 Fed. Rep., 214.]

[2] [This is a change in theory from the Gale opinion at p. 216.]

passed by the directors at a meeting, would be no protection to the cashier as between himself and the bank claiming to get back any money which he might have misappropriated; and if when this check was presented to a creditor of the cashier, at the same time there was presented a copy of such resolution of the bank, I doubt very much whether any court could be found to say that a creditor who took the draft under those circumstances, not only improper in its form but coupled with this resolution of the Board of Directors undertaking to give an authority which showed that there was a dishonest combination in the bank—I do not believe any court would hold that he was entitled to retain the proceeds of that draft as against the claims of creditors or stockholders of the bank.

So it seems to me that *the more logical ground upon which to put this continued course of official conduct, as relieving the party taking the note from the risk of responding*, is this. What challenges attention is the fact that this draft on the bank funds is drawn either to the order of the cashier himself or is drawn to the order of the cashier's personal creditor, for the amount of his personal debt. But if it appears that that was the way in which repeatedly, for a long series of years, drafts of this bank were drawn, then that particular notice ceases to have the weight which it otherwise would have, and the attention of the person receiving the draft is no longer so peremptorily challenged to the impropriety in its form as to hold him responsible for the consequences of taking it.[1] With that point in view it will be for you to consider the effect of the testimony in this case. The question which you will have to determine is whether, during a series of years sufficiently long, and in business transactions sufficiently numerous, cashier's checks of this bank had been going out payable to his own order or payable to the order of his

[1] [Why not, if he did not know of the previous drafts?]

individual creditors to pay his individual debts. If you are satisfied that such transactions had continued for a sufficient length of time, and had been sufficiently numerous to make out a regular course of business in the conduct of the bank, then your verdict will be for the defendant. If, on the contrary, you reach the conclusion that these are but few in number and are scattered over such a period of time that they do not suffice in themselves to make out a regular course of business of the bank, then your verdict will be for the plaintiff.

COURT OF ERRORS AND APPEALS OF NEW JERSEY.

CAMPBELL

vs.

MANUFACTURERS NATIONAL BANK.

MARCH, 1902.

On error to the Supreme Court (SWAYZE, J.).

JOSEPH COULT, FRANCIS CHILD and JOHN A. MILLER, for Plaintiff in Error.

RICHARD V. LINDABURY and SHERRERD DEPUE, for Defendant in Error.

FORT, J., delivering the opinion of the Court :

This is an action by the Receiver of the Middlesex County Bank to recover back, money paid to the plaintiff in error, by George M. Valentine, who was at the time of the payment, cashier of said Bank. The payment was made by Valentine in satisfaction of his individual debt. The method of payment was by a

draft of the Middlesex County Bank, drawn on The National Park Bank of New York, its correspondent, and signed "George M. Valentine, Cashier." The draft thus issued, was drawn to the order of John A. Miller, Attorney, and delivered to him, for the plaintiff in error.

The transaction out of which the indebtedness of Valentine to the plaintiff in error, The Manufacturers National Bank, arose, was the discounting of a note, made by a firm of which Valentine was a member, and endorsed by Valentine, individually, and others. This note, thus discounted, fell due and was protested, and afterward judgment was obtained thereon against the makers thereof, and Valentine individually.

The Middlesex County Bank had no interest, directly or indirectly, in the note or its proceeds.

All these facts were known to the plaintiff in error, both before and after the judgment.

The judgement was entered March 4, 1899.

Mr. Miller, the Attorney of the Plaintiff in Error, after several attempts, found Valentine at the Bank in Perth Amboy, on March 13, 1899. Payment of the judgment was demanded and after some talk, Valentine, in the presence of Miller, took the draft book of the Middlesex County Bank containing blank drafts of that bank on the National Park Bank of New York, and filled out a draft of the Middlesex County Bank upon the National Park Bank of New York, for the sum of Seven thousand and five hundred dollars to the order of J. A. Miller, Attorney as aforesaid, and signed it "Geo. M. Valentine, Cashier" and handed this draft to Miller.

The draft thus delivered to Miller was not, and did not pretend to be, anything other than the drafts of the Middlesex County Bank, made by its Cashier in his official capacity against the funds of the Middlesex County Bank deposited in The National Park Bank of New York, and was intended by Valentine and known by Miller to be issued for the payment of the debt of Geo. M.

Valentine as an individual. With all these facts the Plaintiff in Error, by its officers and its attorney, was familiar.

There is no reason which is founded on principle that can be given for not applying the same rule of agency to a cashier as to or other persons occupying fiduciary relations. No person can act as an agent in a transaction in which he has an interest, or to which he is a party, on the side opposite to his principal. This must be so where the person dealing with the agent has knowledge of the facts.

A person cannot deal with the cashier of a bank as an individual in securing a draft and claim after the draft is delivered it has become the transaction of the bank ; to make the acts of the cashier valid, the transaction in which the draft is delivered must be a bank transaction made by the Cashier, within his express or implied authority, in the conduct of the business of the bank. So long as a person deals with the Cashier in a matter wherein, as between himself and the Cashier, he is dealing with or has a right to believe he is dealing with the bank, the transaction is obligatory upon the bank.

The Cashier is presumed to have all the authority he exercises in dealing with executive functions legally within the powers of the bank itself, *or which are usually or customarily done, or held out to be done, by such an officer.*

But the test of the transaction is whether it is with the bank and its business or with the Cashier personally and in his business.

Claflin vs. Farmers Bank, 25 N. Y. 293.
Moores vs. Citizen National Bank, 111 U. S., 164.

As to the former, all presumptions are in favor of its regularity and binding force. In the latter no such presumption arises, in fact, upon proof that it was known to the claimant to be an individual transaction, and not one for the bank *the burden is cast upon*

the claimant to establish by proof that the act of the Cashier thus done, for his own individual benefit, was authorized and ratified.

These are fundamental principles applicable to principal and agent in every transaction arising out of that relation.

A. D. & T. Co., 143 N. Y. 559 (564).
M. L. Ins. Co. vs. F. S. S. & G. &c. 139 N. Y. 146 (151).
Shaw vs. Spencer, 100 Mass. 382 (390) (394).
Petrie vs. Clark, 11 S. & R. 377 (Gibson C. J.).
Rochester & C. T. R. Co. vs. Paviour, 164 N. Y., 281 (286).
Huffcut on Agency, (2nd Ed.) p. 110.

Little contention was made in this case, even by the Counsel for the plaintiff in error, against the rule above stated, although some effort was made to distinguish between the rule applicable to principal and agent as applied to a Cashier, as contradistinguished from other agency relations, but we are unable to accept such a theory or to hold the rule to be any broader in the case of a Cashier, than as above declared.

Strong contention was made by the plaintiff in error for the right to retain the fund received for Valentine's individual debt, from the proceeds of the draft of the Middlesex County Bank, upon the grounds, (1) that Valentine was authorized to issue such drafts, and (2) that if he were not so authorized his act in this case would be deemed ratified, through the knowledge of the bank's officers obtainable from the draft itself or the records of the bank, from which they actually knew, or were chargeable, in the exercise of ordinary care, with knowing the transaction.

The case is utterly devoid of proof that Valentine was ever authorized by any one to draw drafts of this character for his individual account against the funds of the bank with its New York correspondent. It does appear that he had overdrawn his account and bor-

rowed money on questionable securities, but those transactions are stated by the letters to the banking department to be ones with which the directors were familiar and about which the directors knew and for which they held securities and in which the directors only differed with the banking department as to the sufficiency of the security they had required Valentine to pledge for those loans.

There is no proof that those loans were not made in the usual course; nor that the directors authorized or acquiesced in the use of the bank's funds by Valentine before, or without, their knowledge; nor that Valentine, in any of the transactions out of which these obligations arose, had ever dealt with any person to create his indebtedness to the bank before the bank directors knew of it and had authorized his use of the funds; nor is there anything to show, in any of those letters to the banking department by the President of the Bank, or from that department to the bank, *that the directors knew he was using the funds of the bank, without their knowledge or consent, in his individual transactions* or that he had paid a single individual debt before they were advised of it and had received security from him for the money which he proposed to use to pay it. It would have been an entirely different situation if he had been in the habit of drawing similar drafts against the bank's funds for his individual purposes before consulting the President or the Directors *and they had known of, or subsequently approved, such acts.* That would have been a case within the principle ruled in Goshen Bank vs. The State of New York, hereinafter considered, but that is not this case. Whatever acts are proven to have been done by Valentine, without the approval of the President or Directors first obtained, were admittedly concealed transactions—not open ones—fraudulent acts. It is not pretended that a single one of the thirteen drafts alleged to be fraudulent out of over 16000 honest ones, was actually authorized or ratified by the President or the directors; nor is it pretended that a single open

transaction of that kind was known to or ratified by them.

It is not concealed dishonest transactions which made a ratification but open ones of a character similar to the alleged dishonest ones.

Gale vs. Chase National Bank, 104 Fed. Rep. 214.

If a Bank gives its cashier authority to draw drafts for his own account on its funds or ratifies its acts in *known* transactions which he openly conducts, honestly or dishonestly, it will not be permitted to say that a similar transaction which he secretly and by concealment conducts does not bind it. The distinction is just there. This was the basis of the decision of the New York Court of Appeals, in the Goshen National Bank vs. The State of N. Y., 141 N. Y., 379, upon which the plaintiff in error so strenuously relies. The opinion in that case cites the facts very meagrely. Through the courtesy of the present Chief Judge of that Court, I have had before me all the proofs, findings and exhibits, upon which that case was decided, and an examination of the record fully sustains Judge PECKHAM in saying that the cashier there "had the right to draw a draft on the corresponding bank of the claimant, for himself, upon the same terms that he had to draw a draft for a stranger." Henry Bacon, the President, testified at page 9 of the record, that "He (the cashier), had a right to draw a draft on the Importers and Traders National Bank for himself on the same terms that he would draw for a stranger." George Grier, the Assistant Cashier of the bank, testified, that he was well acquainted with the Cashier's methods of drawing drafts in all his transactions as County Treasurer, for more than a year prior to the drawing of the fraudulent draft in controversy, and that during that period Murray "was accustomed to draw checks as County Treasurer against the funds in his hands as such Treasurer on deposit in the Goshen National Bank, payable to the Goshen

National Bank, in various amounts and then as as Cashier of said Goshen National Bank, to draw drafts for a similar amount on the Importers and Traders National Bank of the City of New York, against the funds of the Goshen National Bank on deposit with said Importers and Traders National Bank, placing said drafts to his credit in said Importers and Traders National Bank as County Treasurer."

There was no dispute under the facts in that case that practically all the time that Murray, the Cashier, was County Treasurer, he had used the Bank's drafts for his own purposes, as such Treasurer, to transfer funds to New York with the knowledge of the President, Assistant Cashier and directors. He was also permitted to draw such drafts to himself as a stranger, in County Treasurer matters, with the same freedom that he would issue such a draft to any customer of the bank. They had allowed him to treat himself in his official relations of County Treasurer, in the matters of issuing cashier's checks or drafts, for County Treasurer's account, as he was permitted to do for any other depositor or other person dealing with the bank in the ordinary course of business.

That case was upon its facts in exact conformity with the principle here sustained and upon all the cases, under the facts proven, was rightly decided. Judge PECKHAM himself, expressly distinguished the Goshen Bank case, from cases like the one before us, in Bank of New York vs. American Book & Trust Co., 143 N. Y., 559 (564).

Nor will the facts in this case justify a finding of constructive notice to the directors of the Middlesex County Bank arising from a failure to know what they would have known, had they exercised ordinary care, *as to the draft issued by Valentine to Miller.* If the draft had been drawn to Valentine's own order, it would have been discoverable upon inspection and some question might then have arisen. This draft was drawn to "John A. Miller, Attorney" and was regularly entered on the stub of the draft book, and would appear

perfectly regular in the account current when returned by the National Park Bank with the vouchers at the end of the month. A bank may issue its draft to any one who pays for it. It is to be [?] said that a bank will be held to ratify a draft, fraudulently issued by its Cashier, though regular on its face, because the other officers of the bank do not trace through the books of the bank to see to what account it is charged. Upon the face of the draft no one but Miller the Attorney, and the officers of the plaintiff in error, beside Valentine, could have known the draft was for his individual debt.

That which is discernible by inspection, upon the face of the draft or record, and which needs no investigation to show it to be out of the ordinary and therefore speaks for itself, will no doubt, raise an implied or constructive ratification, if seen by officers or directors. And, failure to exercise ordinary care in checking off vouchers or inspecting records by bank officials will, no doubt, also raise such a ratification, if it appears that if they had so examined the same, a simple inspection thereof, would have shown the facts.

They are undoubtedly chargeable with the things they know or would have known by the exercise of ordinary care and are estopped from denying the responsibility thereon unless repudiated within a reasonable time after such knowledge or imputed knowledge. But the facts in this case as to the draft in question do not bring it within this rule.

All the points here determined are fully discussed by the opinion in Lamson *et als.* vs. Beard, decided in the United States Circuit Court of Appeals and the same conclusion reached as here.

Lamson vs. Beard, 97 Fed. Rep., 30.

Under all the cases and upon principle, under the facts in evidence, the trial court was right in directing a verdict for the plaintiff and the judgment of the Supreme Court entered on that verdict is affirmed.

GARRISON, J. (concurring) :

I have not been able to see how one agent of a bank could confer general authority upon another agent of the bank to transfer the property or credits of the bank to the latter's individual creditors in payment of his personal debts.

If express authority to this effect had been shown it would not in my judgment have altered the case. Hence of course I do not consider that it was error to refuse to permit the jury to determine whether or not there was implied authority to the same end. For this reason I shall vote to affirm the judgment of the trial Court. I concur wtth the view of Mr. Justice FORT that there was no proof of ratification of this particular transaction.

DIXON, J. (dissenting) :

I think that a bank cashier may be authorized by the board of directors to use the funds of the bank for his private business; and that the terms on which such authority may be given are within the absolute control of the board; to this extent that, when in pursuance of the authority the funds have been paid to a third party in payment of a debt, the fact that such party had notice that they were the bank's funds is not sufficient to warrant the bank in reclaiming them. Nor will the completed transaction be rendered voidable by the further fact, that the terms on which the authority was given are such as to charge the concurring directors with indiscretion or fraud.

It is conceded in this case that the defendant and its agent Mr. Miller had no notice of any suspicious circumstances other than the cashier was using the bank's funds to pay his private debt. This notice devolved on the defendant the burden of showing that such use was authorized by the board of directors.

But I dissent from the present judgment on this ground, that in my opinion the evidence produced at the trial made it a question for the jury, whether the

act of the cashier was within the authority conferred upon him by the board, and therefore the direction of a verdict for the plaintiff was wrong.

NEW JERSEY SUPREME COURT,

February, 1901.

Campbell vs. Manufacturers' National Bank.

Swayze, J. (on motion to direct a verdict, being the decision reviewed in the foregoing opinions): If counsel have nothing further to say, I will decide this motion at once. The conclusion that I have come to in the case is such that it may be well to state at some length the facts as I understand them, and the reasons for the conclusion I have reached at somewhat greater length than I usually would.

Shortly before March 13, 1899, the Manufacturers' National Bank of Newark had recovered a judgment for about $7,700 (I have forgotten the exact amount) against George M. Valentine and another upon a promissory note endorsed by them. John A. Miller was the attorney of the bank in the suit which resulted in this judgment. George M. Valentine was then, and for several years had been, cashier of the Middlesex County Bank, a State institution at Perth Amboy. On that day Judge Miller saw Valentine at the bank in Perth Amboy and received from him in satisfaction of his liability upon the judgment about $200 in cash and a draft of the Middlesex County Bank upon the National Park Bank, its reserve agent in New York City, for $7,500. This draft was in the ordinary form, payable to the order of John A. Miller, attorney, and signed by George M. Valentine as cashier of the Middlesex County Bank. Judge Miller at once had it certified by the Park Bank, endorsed it "John

A. Miller, attorney," and then "John A. Miller," and deposited it to his own account in the Manufacturers' National Bank, which forwarded it for collection to New York. At the same time or soon after, Miller settled with the Manufacturers' Bank for the amount he had thus collected, by his individual check for a considerably larger amount, including in the check some other items. The draft of the Middlesex County Bank was paid in due course of business by the Park Bank and returned, with other vouchers and the regular monthly statement, to the Middlesex County Bank on or about April 1, 1899.

In July, 1899, the Middlesex County Bank failed. It was then discovered that Valentine had misappropriated the funds of the bank to a very large amount, chiefly by means of drafts on the Park Bank, used by him for his individual purposes.

Edward S. Campbell, the present plaintiff, was appointed receiver of the Middlesex County Bank, and, some time in 1900, began this suit to recover back the amount paid by Valentine to Miller. The plaintiff, at the close of the case, abandoned his claim to recover the *cash* paid to Miller, and limited his claim to the amount of the draft and interest.

The theory upon which the plaintiff seeks to recover is that the defendant is chargeable with knowledge that Valentine used the money of the bank to pay his individual debt, and that, having wrongfully received the bank's money, it must now make restitution. The plaintiff's case rests upon the legal principle that no person can act as agent in regard to a contract in which he has any interest, or to which he is a party, on the side opposite to his principal. This doctrine is so well settled in its application to this class of cases that it is unnecessary to do more than refer to the cases cited at the argument.

Claflin v. *Farmers' and Citizens' Bank* (1862), 25 N. Y., 293.

Anderson v. *Kissam* (1888), 35 Fed. Rep., 699.

Goshen National Bank v. *State of New York* (1894), 141 N. Y., 379; 36 N. E., 316.
Bank of New York National Banking Association v. *American Dock & Trust Company* (1894), 143 N. Y., 559; 38 N. E., 713.
Hanover National Bank v. *American Dock & Trust Company* (1896), 148 N. Y., 612; 43 N. E. 72.
Corn Exchange Bank v. *American Dock & Trust Company* (1896), 149 N. Y., 174; 43 N. E., 915.
Lamson v. *Beard* (1899), 94 Fed. Rep., 30.
Gale v. *Chase National Bank* (1900), 104 Fed. Rep., 214.

This general principle is not disputed by the defendant. It is insisted that it is inapplicable to the present case for several reasons:

1. Because the draft was to the order of Miller instead of to the order of the bank; was taken by him without the knowledge or authority of the defendant bank; was mingled with other funds, and so paid to the Manufacturers' Bank.

2. Because it is said Valentine was authorized by his own bank to draw drafts to his own order, and the defendant had the right to rely on that authority.

3. Because the Middlesex County Bank failed to call the attention of the Manufacturers' Bank to Valentine's alleged want of authority, although it had the cancelled draft in its possession and a monthly statement of the Park Bank showing payment of the draft as early as April 1, 1899.

As to the first ground of defense—that the Manufacturers' Bank cannot be held by reason of Miller's acceptance of the draft—I think it quite enough to say that Miller was acting at the time as the bank's agent, about the bank's business, and that the bank was responsible for his acts and chargeable with notice of any infirmity in this draft to the same extent as Miller

himself. The Manufacturers' Bank was the principal, and Miller merely its attorney.

The question of the cashier's authority is the serious and difficult question in the case, and the question to which the evidence has been chiefly directed. The cashier of a bank is the general executive officer of the bank and transacts its business under the orders and supervision of the Board of Directors. His power as cashier, by virtue of his office alone, is greater than the power of any other officer of a corporation. As cashier, he has authority, by virtue of his office alone, to draw drafts upon the bank's deposits in another bank; but this power does not extend so far as to authorize him to draw drafts to his own order for his own use. This is forbidden by the principle of law already referred to,—that no person can act as agent in regard to a contract in which he has any interest, or to which he is a party on the side opposite to his principal. The fact that a bank draft is commercial paper does not avail in favor of a creditor of the cashier who takes the cashier's draft on his bank's account in satisfaction of a private debt of the cashier. The reason is that the creditor who takes such a draft necessarily has notice, from the face of the draft itself, that he is being paid with the bank's money. He is in no better position than if he stood by and saw the cashier take the money out of the bank's till. On the face of things, the money belongs to the bank; nothing can overcome this fact, which is apparent on the face of the draft, unless the cashier has had authority to draw drafts to his own order conferred upon him in some way by the directors. If the cashier had had such authority conferred upon him, a draft to his own order is like a draft to the order of any one else, and is binding upon the bank. The presumption is that the money is the bank's money; it is for the person dealing with the cashier to establish the contrary by proof. The burden is upon the person dealing with the cashier in his own matters to inquire

as to the cashier's authority. He cannot rely merely upon the fact that the person signing the draft is cashier. The case differs from cases where the bank is held bound by the cashier's representations; the bank is only held to be bound by such representation when the bank has given him the authority to act and thereby put it in his power to misrepresent. When, as in this case, one deals with an agent who is apparently without authority, he is bound to inquire into the agent's authority to represent the principal. In the ordinary case of a bank draft to the order of a third party, the fact that it is signed by the cashier is enough; the authority to draw such a draft inheres in the office. In the case of a draft by the cashier to his own order, to pay an individual obligation, the person taking it is bound to inquire into the cashier's special authority to issue such a draft. If he fails to inquire, he takes the draft at his peril. This rule, which manifestly tends to secure honesty, and to protect banking institutions against the misconduct of their officers, is thoroughly sustained by the authorities above cited. The case of the *Goshen National Bank* v. *State* (1) was relied upon as establishing a contrary view. Undoubtedly the language of Judge PECKHAM does sustain the defendant's view; but the language of the opinion was unnecessarily broad, for the fact was that the debt paid by the draft in that case was not the individual debt of the cashier, but was a debt of Orange County to the State of New York for taxes held by the cashier as county treasurer; and the further fact appeared, as stated in the opinion, that Murray, the cashier, had the right to draw drafts for himself upon the same terms that he would have had in the case of a third party.

The Goshen National Bank case was decided February 27, 1894. On November 27, 1894, the same court, in an opinion also by Judge PECKHAM, decided the

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(1) 141 N. Y. 379; 36 N. E. 316.

case of *Bank of New York National Banking Association* v. *American Dock & Trust Company*, (1) and distinguished the Goshen National Bank case upon the ground lastly stated above. I am referred to *Morse on Banking*, sec. 165. In par. *(b)* the author says that "if the act which the cashier assumes to perform is one intrinsically proper to be committed to his charge, the law will presume in favor of a third party dealing with him that he was duly authorized to perform it." But a reading of the whole section shows that this presumption is only made in favor of an innocent party; and, for the reason already stated, a creditor of the cashier taking the bank draft signed by the cashier in payment of an individual debt, is not an innocent party; he is chargeable with notice of the infirmity of the draft.

The question to be decided, therefore, in this case is whether Valentine had authority to sign draft to his own order. If he had such authority, the plaintiff must fail. If he had no such authority, the plaintiff must prevail, unless some other defense is made out.

It is, of course, true, as Morse says in the section already cited, that this authority may be conferred not only by resolution of the Board of Directors but by verbal direction, by usage and by tacit approval. A careful statement of the general principle is to be found in *Morawetz on Corporations*, sec. 509, and in an opinion by Justice HARLAN in *Mining Company* v. *Anglo-Californian Bank* (1881), 104 U. S., 192.

The principle is stated with even greater accuracy by Justice DEPUE in the case of the *Fifth Ward Savings Bank* v. *First National Bank of Jersey City*, 19 Vr., 527, as follows:

"There are cases in which the powers of an officer of a corporation and his authority to act for the company are enlarged beyond those powers which are in-

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(1) 143 N. Y. 559; 38 N. E. 713.

herent in his office. But those are cases in which the agency of the officer has arisen from the assent of the directors, presumed from their consent and acquiescence in permitting the officer to assume the direction and control of the business of the company. Thus, when, in the usual course of the business of a corporation, an officer has been allowed to manage its affairs, his authority to represent the corporation may be implied from the manner in which he has been permitted by the directors to transact its business. These are simply instances of the application of the principle that usual employment is evidence of the powers of an agent, and a responsibility will be laid upon the principal for the acts of his agent within the apparent authority so conferred upon the agent—a doctrine which has come to be applied to corporations in many respects as well as to individuals, and with the same qualifications and limitations. In such cases the authority of the officer does not depend so much on his title, or on the theoretical nature of his office, as on the duties he is in the habit of performing."

In the present case there is no proof of any express authority, either verbal or by formal resolution, to the cashier to draw drafts to his own order. There is proof that from September 12, 1894, to March 13, 1899, he drew fourteen drafts which appeared on the stubs of the draft books to be drawn to his own order; that from December 20, 1893, to March 13, 1899, he had drawn eight other drafts, which appeared by the stubs to be drawn to the order of third persons, but which were actually used by Valentine for his own purposes. In most cases the stub was for a small amount, the draft for a large amount. In all but five cases the amount as it appeared on the stubs was correctly carried through the books of the bank, and these books, aside from the stubs of the draft books, regularly balanced. The five drafts which were never carried from the stubs through the books were omitted by the direction of Valentine, who told the clerks that he would make the entries himself. An examination

of the stubs of the draft books would have disclosed the omitted drafts and would have disclosed that the fourteen drafts had been drawn to Valentine's own order. A comparison of the monthly statement of the Park Bank with the books of the Middlesex County Bank, or a comparison of the vouchers returned by the Park Bank with the stubs of the draft books would have disclosed the frauds. Inquiry by the president or directors of the Park Bank as to the balance of the account would have disclosed at once the large discrepancy between the balance on the books of the Park Bank and the balance as shown by the daily statement of the Middesex County Bank. Notwithstanding these facts neither the directors nor the State Banking Departments discovered the frauds until the failure of the bank. It is true that the Banking Department, as early as November 18, 1895, called the attention of the president to a large overdraft by Valentine and to loans to him insufficiently secured, and apparently for speculative purposes, and subsequently called the president's attention to a false report made by him and Valentine. The loans and overdrafts seem to have been adjusted, and no further action was taken upon the false report. A portion of the letter of November 18, 1895, from the Banking Department to the president was read by Valentine at a meeting of the Board of Directors, but all the directors who were present testify that the portion relating to his own loan and overdraft was not read. At any rate, no suspicion was aroused and no examination or investigation made by the directors, who say that they relied entirely on the examinations made by the Banking Department. Under this state of facts the defendant insists that the directors must be assumed to know what would have been disclosed by an examination of their own books. Such an examination would have disclosed that Valentine was drawing drafts to his own order and for his own purposes. The inference is that they acquiesced in this course of business and thereby gave him an implied authority to

draw drafts to his own order and for his own purposes; and the argument is that the authority once having been vested in Valentine was available to all persons dealing with him. On the other side it is said that an examination of the stubs would have disclosed only the fourteen drafts to Valentine's own order, and that, for aught that appeared upon the stubs of the bank books, the drafts to Valentine's order might have been signed by the president; that such would be the presumption upon the principle *omina presumuntur rite acta.*

The question in the case is narrowed, then, to the question whether an implied authority arises out of the number of transactions proved in this case, which were not known to the directors, but which they would have known if they had not been negligent.

The liability of the Middlesex County Bank for the act of its cashier does not, I think, depend upon the principles of the law of negligence; one reason is that the Manufacturers' Bank is not, in this case, an innocent party—that is, a party not chargeable in law with notice of the cashier's fraud; another reason is that the Manufacturers' Bank was itself negligent in failing to enquire into the cashier's authority. On this point I think the law is well stated by Judge COOLEY in the case to which I was referred.

New York Iron Mine v. Negaunee Bank (1878), 39 Michigan, 644.

At page 656 he says: "But before the maxim which the plaintiff invokes can be applied to the case, it is necessary to determine not only that fault as imputable to the defendant, but also that the plaintiff is free from negligence. There must be one innocent party and one negligent party before the requirements of the maxim are answered; and the conduct of the plaintiff is therefore as important as that of the defendant. Was the plaintiff in this case free from negligence in discounting the three $5,000 notes? In law the officers of the

bank must be held to have known that Mr. Wetmore had no right to make such paper without express authority, and we look in vain for any evidence that they demanded proof of such authority, or extended their inquiries beyond the agent himself. Moreover, there was that on the face of the notes to suggest special caution ; they were made by Mr. Wetmore in one capacity to himself and his associate in another capacity, and they indicated, or at least suggested, an interest on his part in making them which was adverse to the interest of his principal."

I think, therefore, that the question of the negligence of the directors is not the crucial point in the case. An authority may be implied from a course of business without any negligence on the part of the directors. It is implied if the directors know of the course of business and allow it to go on without objection ; and it has been held in the United States Supreme Court and in the New York Court of Appeals that it may be implied if they allow it to go on without objection when they ought to know it. The assent of the directors is implied, either from their actual knowledge or from a presumption of knowledge arising out of the facts of the case. A reading of the cases already cited has led me to the conclusion that the ground upon which they go is that the knowledge of the directors is presumed from the number of the transactions and their publicity, and that the cases do not go upon the ground that the directors were negligent in failing to discover the transactions. Thus, in *Martin* v. *Webb*, (1) the transactions covered a series of years, were legal transactions right in themselves, included the cancellation of numerous mortgages, and must have been of a public character, appearing in the county records ; the business of the bank was of such a kind that the directors must have known that somebody had to act for the bank in the

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(1) 110 U. S. 7.

cancellation of the mortgages, and must have known that there was nobody but the cashier to act. In such circumstances it would be manifestly unjust to allow the directors to say they did not know what the cashier had openly and frequently done; the law presumes that they knew.

In the Hanover National Bank case, (1) the opinion expressly says that Stone had *openly* assumed to issue certificates for himself for deposits of cotton.

In *Auten* v. *United States National Bank*, (174 U. S., 125), the directors knew that the bank's paper was rediscounting in large amounts, and that money was borrowing continually; they must have known that the paper was being endorsed by some one for the bank.

In *Blake* v. *Domestic Sewing Machine Company*, (38 Atlantic, 241) the notes were so numerous, the transactions were so frequent and continued for such a length of time, that a course of business had been clearly established, which it was perfectly fair to presume the directors knew. In none of these cases was there negligence on the part of the person dealing with the officer of the corporation. In all of these cases the transactions which it was held constituted a course of business, knowledge of which was imputed to the directors, were, in themselves, fair transactions. In my judgment, the basis of the rule is accurately stated in the case of the *Fifth Ward Savings Bank* v. *First National Bank*, (2) above cited; and I think the expressions in *Martin* v. *Webb* and in the *Hanover National Bank* case, so far as they seek to extend the rule by inferring an authority from transactions which the directors "ought to know" as distinguished from transactions which they are "presumed to know," state the rule too broadly—more broadly than the facts of those cases required. The real question is not whether the directors were negligent, but whether such a course

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(1) 148 N. Y. 612; 43 N. E. 72.
(2) 19 Vroom, 518.

of business has been established that acquiescence of the directors is a necessary conclusion.

If the number of instances, then, in which Valentine signed drafts for himself is so great that an inference may fairly be drawn that the directors must be presumed to have known of the course of business, authority to draw drafts to his own order must be implied, and the plaintiff in this suit must fail. It is obvious that it is impossible to fix a hard and fast rule as to the number of instances which are necessary to establish a course of business; and, in a case of doubt, I ought to leave it to a jury to say. In *Gale* v. *Chase National Bank*, (1) nine instances in a few months were held insufficient and the judgment was reversed because the judge had left the question to the jury instead of directing a verdict for the plaintiff. Whether the number of instances in which Valentine drew drafts for himself would, if the transactions were fair in other respects, suffice, I do not pretend to decide. I do not think it is the number of instances in which it is exercised that determines the cashier's authority. The question is whether, under all the circumstances of the case, the authority has been exercised so often and in such a way that the assent of the directors must be assumed. The circumstances of the case determine, also, whether the question is to be decided by the Court or submitted to the jury. In the Fifth Ward Savings Bank case (2) a verdict was directed as to some of the bonds, and the question submitted to the jury as to other bonds. In the American Saw Company case (3) the trial Judge allowed the question to go to the jury, and the Court of Errors held that he ought to have directed a verdict. The rule laid down in the latter case is to submit the question to the jury

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(1) 104 Fed. Rep. 214.

(2) 19 Vroom, 513.

(3) *American Saw Co. of New York* v. *First National Bank of Trenton*, 31 Vroom, 417.

if the evidence be doubtful or conflicting as to a material fact, or if the established facts admit of conflicting inferences determinative of the issue. In this case the evidence is not doubtful or conflicting; nor do the established facts, as I look at the case, admit of conflicting inferences upon any point determinative of the issue.

In all but five of the instances in which Valentine drew these drafts the drafts were raised—that is, for larger amounts than were entered on the books—and those five drafts were issued without consideration to the bank. Now, to hold that the directors can by their knowledge, or even by their express approval, authorize the cashier to make such a use of the bank's funds, and thereby bind the bank, seems to me impossible. If assent of the directors is to be presumed, it must be an assent to the whole of the transaction—that is, an assent to the issue of drafts by the cashier for his own use for a larger amount than is paid to the bank, or without any payment to the bank at all. The directors themselves are but agents, and to authorize the cashier to thus rob the bank is beyond their power. The attempt to do it would make them wrongdoers themselves, and the cashier could not legally derive any power from the action of his accomplices in the frauds.

Anderson v. *Kissam*, 35 Fed. Rep. 699.

A different principle applies where a case of estoppel is made out. In such a case the bank is responsible because it has put its agent, directors or cashier in a position to mislead third parties to their prejudice. We are here dealing not with a case of estoppel, but with a question of authority of the cashier sought to be inferred from a course of business; and in the absence of estoppel, I think no authority can be implied from a series of frauds. A course of business means a series of honest, not a series of dishonest, transactions. It is urged that there were some other drafts drawn for Valentine's own use, besides those to which attention

was called during the trial. It does not appear how many there were, for what amounts, or to whose order they were drawn. My recollection of Valentine's testimony is that they were not drawn to his order. I do not think they are sufficient in number to aid the defense.

It was urged, also, that the corporation itself, as distinguished from the directors, knew of Valentine's acts because it is chargeable with knowledge of what its president knew. Assuming that the knowledge of the president was proved, I think the principle invoked by the defendant does not apply. The question is not whether notice is chargeable against the corporation, but whether assent to or acquiescence in a course of conduct is to be presumed.

It was urged at the argument that the issue of this particular draft was ratified. As I understand the law of agency, there must be actual knowledge in order that there may be a ratification. This knowledge is denied by the directors, and not proven in any other way. If they had ratified by formal vote, I think such ratification would not bind the bank; for its directors are without power to ratify a theft.

It may be urged perhaps, that, although the theft of the $7,500 by Valentine could not be ratified by the directors so as to bind the bank, yet the bank may be bound by reason of laches—by failing to notify the Manufacturers' Bank for more than a year. The answer to this is that the Manufacturers' Bank has not been proved to have lost anything, or to have been in any way prejudiced by the delay. If it fails in this suit, it still has its claim against Valentine, which, as far as the evidence shows, is as good as it was on March 13, 1899.

It was further urged upon the argument that I should submit to the jury the question whether the directors did not have actual knowledge that Valentine was drawing drafts to his own order, notwithstanding their denials. Even if the circumstances were much stronger than they are against his testimony, I

should not feel justified in allowing a jury to find that the directors had testified falsely where their testimony was in itself so probable. In this case, if knowledge was to be proved, the burden of proof was on the defendant, which sought to establish that fact; this burden could clearly not be sustained by the circumstances proven in this case as against the positive denials of the witnesses. The facts of the case seem to me undisputed; the inferences to be drawn therefrom do not seem to be open to debate; the legal effect I must decide.

It is very likely, though it is not proved, that there is a practice among bank cashiers to draw drafts for their own purposes on the same terms as for other customers. It is unfortunate for the defendant that it should suffer from any reliance it may have placed upon this practice, if it be a practice; but the only safe rule is the one adopted in the cases referred to. Every one dealing with the cashier of a bank in his private matters must satisfy himself as to the cashier's authority to use the bank's funds, or suffer the consequences. Whether this rule will be ultimately adopted in this State, I cannot say, but I am convinced that it ought to be adopted; it makes for honesty.

I shall direct the jury to render a verdict for the plaintiff for $7,500 and interest from March 13, 1899.